United States Court of Appeals for the District of Columbia

APRIL TERM, 1939.

No. 7465

THE WASHINGTON TERMINAL COMPANY, APPELLANT,

vs.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, H. L. SCHUYLER, J. H. SMALLWOOD, E. J. COUGHLIN, F. J. CHRISMORE, G. J. YATES, B. B. YATES, JAMES G. EARLY, H. L. UTZ, L. W. THOMPSON, H. I. KINGMAN, W. H. McCOY, W. K. HARMAN, H. M. BEALL, C. M. ABELL, W. L. GROOMES, W. G. GAGE, N. E. KINGMAN, C. E. THORNE, L. G. FROCKE, H. S. YATES, H. H. WELCH, N. A. KELLY, F. C. BRANIGAN, R. EDELIN, R. G. MOLER, R. CARROLL, C. L. YEW, J. E. BROWN, L. H. CRAVEN, C. B. DIEDRICH, J. T. GREENE, JOHN A. MURPHY, J. F. MITCHELL, R. H. AYLOR, C. C. EVANS, H. E. JONES, R. L. MATTINGLY, O. W. SHEETS, W. L. STEWART, R. C. THOMAS, R. A. MILLION, C. M. GREENE, T. E. SMITH, T. L. MATTHEWS, T. E. BOLEN, C. C. WALSH, A. S. TALBOTT, P. F. CRAVEN, M. J. PALMISANO, C. T. CARTER, F. A. BABCOCK, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

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a. District Court of the United States for the District of Columbia

Civil Action No. 1165

THE WASHINGTON TERMINAL COMPANY, *Plaintiff*,

vs.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, ET AL., *Defendants.*

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

IN THE

District Court of the United States

FOR THE DISTRICT OF COLUMBIA

THE WASHINGTON TERMINAL COMPANY,
Union Station, Massachusetts Ave., N. E.,
Plaintiff,

vs.

F. E. BOSWELL,
E. R. BURKHEAD,
R. R. BRIDGES,
H. L. SCHUYLER,
J. H. SMALLWOOD,
E. J. COUGHLIN,
F. J. CHRISMORE,
G. J. YATES,
B. B. YATES,
JAMES G. EARLY,
H. L. UTZ,
L. W. THOMPSON,
H. I. KINGMAN,
W. H. McCOY,
W. K. HARMAN,
H. M. BEALL,
C. M. ABELL,
W. L. GROOMES,
W. G. GAGE,
N. E. KINGMAN,
C. E. THORNE,
L. G. FROCKE,
H. S. YATES,
H. H. WELCH,
N. A. KELLY,
F. C. BRANIGAN,
R. EDELIN,
R. G. MOLER,
R. CARROLL,
C. L. YEW,
J. E. BROWN,
L. H. CRAVEN,
C. B. DIEDRICH,
J. T. GREENE,
JOHN A. MURPHY,
J. F. MITCHELL,
R. H. AYLOR,
C. C. EVANS,
H. E. JONES,
R. L. MATTINGLY,
O. W. SHEETS,
W. L. STEWART,
R. C. THOMAS,
R. A. MILLION,
C. M. GREENE,
T. E. SMITH,
T. L. MATTHEWS,
T. E. BOLEN,
C. C. WALSH,
A. S. TALBOTT,
P. F. CRAVEN,
M. J. PALMISANO,
C. T. CARTER,
F. A. BABCOCK,
Defendants.

Filed December 29, 1938

CIVIL ACTION,
File No. 11655

COMPLAINT FOR DECLARATORY JUDGMENT.

The plaintiff, The Washington Terminal Company, complains of the above named defendants and avers:

1. This is a suit of a civil nature for a declaration under the Declaratory Judgments Act (28 U. S. C. sec. 400) of the rights of the

plaintiff under a certain contract of February 1st, 1923, hereafter more specifically referred to in paragraph 4 hereof.

2. Plaintiff is a corporation duly incorporated and existing under the laws of the United States (Act of February 12, 1901, 31 Stat. 779; Act of February 28, 1903, 32 Stat. 773); is a resident of the District of Columbia, having its principal office and place of business in the District of Columbia located at Union Station, Massachusetts Avenue, North East, Washington, D. C.; and is engaged in the operation and management of a railroad terminal in the City of Washington.

3. Defendants are employees of the plaintiff performing service in the District of Columbia on properties of the plaintiff as enginemen and/or firemen engaged in operating or firing plaintiff's yard-engines which perform switching service in and about said Terminal. Defendants reside at the places listed opposite the name of each defendant as follows:

(1) F. E. Boswell, residing at 21 Franklin, Rogers Heights, Md.
(2) E. R. Burkhead, residing at 1650 W. Virginia Ave., N. E., Apt. #2, Washington, D. C.
(3) R. R. Bridges, residing at 312 18th St., N. E., Washington, D. C.
(4) H. L. Schuyler, residing at 64 Duncan Ave., Alexandria, Va.
(5) J. H. Smallwood, residing at 1825 Jackson St., N. E., Washington, D. C.
(6) E. J. Coughlin, residing at 4511 Ivy, Brentwood, Md.
(7) F. J. Chrismore, residing at 1326 Emerson St., N. E., Washington, D. C.
(8) G. J. Yates, residing at 5024 7th Place, N. W., Washington, D. C.
(9) B. B. Yates, residing at 3313 E St., S. E., Washington, D. C.
(10) James G. Early, residing at 1404 Lawrence St., N. E., Washington, D. C.
(11) H. L. Utz, residing at 3742 1st St., S. E., Washington, D. C.
(12) L. W. Thompson, residing at 25 Bayly Ave., Hyattsville, Md.
(13) H. I. Kingman, residing at 830 Valley St., Seat Pleasant, Md.
(14) W. H. McCoy, residing at 819 Bayly Ave., Hyattsville, Md.
(15) W. K. Harman, residing at 120 V St., N. E., Washington, D. C.
(16) H. M. Beall, residing at 26 Q St., N. E., Washington, D. C.
(17) C. M. Abell, residing at 1312 A St., S. E., Washington, D. C.
(18) W. L. Groomes, residing at 1316 Euclid St., N. W., Apt. No. 1, Washington, D. C.
(19) W. G. Gage, residing at 3753 W St., N. W., Washington, D. C.
(20) N. E. Kingman, residing at 830 Valley St., Seat Pleasant, Md.
(21) C. E. Thorne, residing at Oxon Hill, Md.
(22) L. G. Frocke, residing at 404 G St., N. E., Washington, D. C.
(23) H. S. Yates, residing at 1712 C St., N. E., Washington, D. C.
(24) H. H. Welch, residing at 4321 4th St., N. W., Washington, D. C.
(25) N. A. Kelly, residing at 135 12th St., N. E., Washington, D. C.
(26) F. C. Branigan, residing at 4205 20th St., N. E., Washington, D. C.
(27) R. Edelin, residing at 2331 3rd St., N. E., Washington, D. C.
(28) R. G. Moler, residing at 404 G St., N. E., Washington, D. C.
(29) R. Carroll, residing at 12 Virginia Ave., Brunswick, Md.
(30) C. L. Yew, residing at 819 Bayly Ave., Hyattsville, Md.
(31) J. E. Brown, residing at 628 8th St., N. E., Washington, D. C.
(32) L. H. Craven, residing at Hyattsville, Md.
(33) C. B. Diedrich, residing at 3201 Walnut St., N. E., Washington, D. C.
(34) J. T. Greene, residing at 1422 F St., N. E., Washington, D. C.
(35) John A. Murphy, residing at 931 7th St., N. E., Washington, D. C.

(36) J. F. Mitchell, residing at 1657 Trinidad Ave., N. E., Washington, D. C.
(37) R. H. Aylor, residing at 3742 1st St., S. E., Washington, D. C.
(38) C. C. Evans, residing at 312 A St., N. E., Washington, D. C.
(39) H. E. Jones, residing at 1509 V St., S. E., Washington, D. C.
(40) R. L. Mattingly, residing at Springfield, Va.
(41) O. W. Sheets, residing at Silver Spring, Md.
(42) W. O. Stewart, residing at 1423 Morse St., N. E., Washington, D. C.
(43) R. C. Thomas, residing at 40 V St., N. W., Washington, D. C.
(44) R. A. Million, residing at Capitol Heights, Md.
(45) C. M. Greene, residing at 1216 Massachusetts Ave., N. W., Washington, D. C.
(46) T. E. Smith, residing at 206 7th Ave., Brunswick, Md.
(47) T. L. Matthews, residing at Falls Church, Va.
(48) T. E. Bolen, residing at R. F. D. 4, Anacostia, D. C.
(49) C. C. Walsh, residing at 904 D St., S. W., Washington, D. C.
(50) A. S. Talbott, residing at 1316 Euclid St., N. W., Washington, D. C.
(51) P. F. Craven, residing at 534 1st St., S. E., Washington, D. C.
(52) M. J. Palmisano, residing at 421 2nd St., N. E., Washington, D. C.
(53) C. T. Carter, residing at 421 2nd St., N. E., Washington, D. C.
(54) F. A. Babcock, residing at 608 A St., S. E., Washington, D. C.

4. An actual controversy exists between plaintiff and said defendants and each of them concerning the rights of the plaintiff and said defendants under a certain contract or agreement entitled "Schedule of Rules and Rates of Pay for Enginemen and Firemen" entered into on or about February 1, 1923, by and between the plaintiff and its employees of the classes to which defendants belong, said employees being represented in the making of said contract by the General Chairman of the Brotherhood of Locomotive Engineers and the General Chairman of the Brotherhood of Locomotive Firemen and Enginemen respectively; said controversy having resulted from a purported award of the National Railroad Adjustment Board, First Division, (Award No. 3115, Docket No. 5059) rendered October 24, 1938, purporting to interpret and apply said contract; subsequent to which award defendants have made and are now making demands upon plaintiff for payments of sums of money under said contract which plaintiff claims and hereby avers to be not lawfully due or owing under said contract.

5. Plaintiff is engaged in the management and operation of railroad terminal facilities which include a passenger station known as the Union Station, Washington, various tracks and switches over which passenger trains enter and leave said terminal, a yard where the coaches and other cars comprising such passenger trains are stored during the interval between the time when such trains arrive at the passenger station and depart therefrom, and an enginehouse where locomotives are kept when not in use.

6. The Washington Union Passenger Station and other facilities of plaintiff were constructed under the authority of Acts of Congress approved February 12, 1901 (31 Stat. at L. Page 774) and February 28, 1903 (32 Stat. at L. Page 773) for the purpose of providing a single convenient passenger station for all railroads entering the City of Washington, and said passenger station was first opened for general use November 17, 1907, since which date all passenger trains serving

the City of Washington have entered into or departed from said Union Station.

7. Plaintiff operates no passenger trains and employs no road engine or road train crews and all passenger trains which enter and depart from said Union Passenger Station belong to and are operated by one or more of certain railroad companies known as and hereafter referred to as the Tenant Lines, said lines being The Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Chesapeake and Ohio Railway Company. All said passenger trains operate for the major portion of their runs on the tracks of one or more of said Tenant Lines between Washington and various other cities of the country and use the tracks and facilities of the plaintiff for only a short distance in entering and leaving said passenger station.

5 8. The movement of loaded passenger trains from points outside of Washington into the Washington Union Station, from the Washington Union Station to points outside of Washington, and through the Washington Union Station from a point outside of Washington to another point, are performed and have always, since the opening of the Terminal for general use on or about November 17, 1907, been performed exclusively by road engines manned by road engine crews employed by said Tenant Lines.

9. When passenger trains commence or terminate their runs at Washington the road engine crews of the Tenant Lines are required and always have been required by the Tenant Lines to deliver the road engine to the enginehouse at the end of a run and to bring the road engine from the enginehouse to the Station at the commencement of a run, respectively. Said road engines when so operated over the plaintiff's tracks between the Station and the enginehouse are and always have been manned by road engine crews employed by the Tenant Lines.

10. In addition to the movement of loaded passenger trains into, out of, and through the Washington Union Passenger Station, certain other movements of equipment take place over the tracks of the plaintiff, as follows: Empty passenger trains which have discharged their passengers at the Station are moved to the storage yard; trains of empty passenger cars are moved from the storage yard to the Station for the purpose of taking on passengers and leaving for their destination; where trains of passenger cars have come into the Station one or more cars are sometimes cut off from the head end of said train and removed in a single movement to some designated track; where a train of passenger cars is standing in the Station before departure one or more cars are sometimes moved from another track against the head end of such train and coupled on to form a part of said train on its journey over the road; when trains of passenger cars have come into the Station and discharged their passengers, said empty trains are sometimes moved a sufficient distance to permit the road engine which has brought such train into the Station to be uncoupled from the train and proceed by a crossover movement to another track. Many movements of the kinds heretofore described in this paragraph are and always have been, since the commencement of operation of said ter-

minal in 1907, performed, where in the judgment of the managing officers of the plaintiff efficiency or promptness in the operation of the terminal is thereby promoted, by the use of the road engine which has brought such train into the Station or is about to haul such train to its destination, incidental to the movement of such road engine between the station and the enginehouse; and in making such movements such road engines are and always have been manned by the road engine crew which is required as part of its duties to deliver said road engine to the enginehouse at the completion of a run and to bring such road engine from the enginehouse to the station at the commencement of a run.

11. Movements over the tracks of the plaintiff other than movements of the kind described in paragraphs 9 and 10 above are made and have been generally made by yard engines of the plaintiff manned by yard engine crews employed by the plaintiff.

12. On or about June 1, 1910, the plaintiff published certain rules and regulations for the government of the yard engine firemen in plaintiff's employ, defining the terms of the employment and the rights of said employes thereunder, which rules and regulations are set forth in full in Exhibit A attached hereto and are made a part hereof as fully as if set forth in this paragraph.

13. On or about September 1, 1911, the plaintiff published certain rules and regulations for the government of yard enginemen in plaintiff's employ, defining the terms of the employment and the rights of the employes thereunder, which rules and regulations are set forth in Exhibit B attached hereto and are made a part hereof as fully as if set forth in this paragraph.

14. Said regulations defining the employment of yard firemen and enginemen in plaintiff's employ continued in effect until December 1, 1919, when the same were superseded by a "Schedule of Rules and Rates of Pay for Enginemen, Firemen and Yardmen" entered into by and between the Director General of Railroads of the United States on behalf of the Washington Terminal Railroad and the enginemen, firemen and trainmen employed thereon represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and Brotherhood of Railroad Trainmen, respectively, which said schedule is set forth in full as Exhibit C hereto and made a part hereof as fully as if set forth in this paragraph.

15. Subsequently thereto on or about February 1, 1923, the plaintiff entered into an agreement with the yard enginemen and yard firemen in its employ represented by the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, respectively, which agreement, entitled "Schedule of Rules and Rates of Pay for Enginemen and Firemen" is set forth in full as Exhibit D hereto and made a part hereof as fully as if set forth in this paragraph, and which agreement remains and has remained since February 1, 1923, in effect as the only contract existing between the plaintiff and the enginemen and firemen in its employ, including the defendants herein, defining the terms of employment of said enginemen and firemen.

16. Said "Regulations and Rates of Pay for the Government of Firemen" of June 1, 1910 (Exhibit A), "Regulations and Rates of Pay for the Government of Enginemen" of September 1, 1911 (Exhibit B), "Schedule of Rules and Rates of Pay for Enginemen, Firemen and Yardmen" of December 1, 1919 (Exhibit C), and "Schedule of Rules and Rates of Pay for Enginemen and Firemen" of February 1, 1923 (Exhibit D), all contain substantially similar provisions establishing certain rights of seniority as between plaintiff's employes belonging to each respective class covered by said regulations or schedules, said provisions, among other things, entitling the employes of a given class to vacancies and new runs in the order of seniority of the applicants, providing for seniority as a factor in promotion and according recognition in similar respects to length of service in a particular employment, said provisions being more specifically identified by reference to the Exhibits attached hereto as follows:

Exhibit A, paragraphs 1, 2, 3, 21, 22, 26, 30, 32
Exhibit B, paragraphs 1, 2, 5, 19, 21, 22, 24
Exhibit C, Article 8, Article 9
Exhibit D, Article 8, Article 9

17. At the date when the first of said above mentioned regulations and schedules, to wit, the regulations of June 1, 1910 (Exhibit A) went into effect, and continuously thereafter during the entire period when said various regulations and schedules above referred to were successively in force and effect, and continuously during the period since said schedule of February 1, 1923, (Exhibit D) has been in effect, the uniform and continuous usage and practice has been for movements of the character described in paragraph 10 above to be made by road engines manned by road crews employed by the Tenant Lines whenever in the judgment of plaintiff's managing officials efficiency or promptness in the operation of the Terminal was thereby promoted, and a large proportion of such movements have always been and are being so performed by the use of road engines manned by road engine crews employed by said Tenant Lines.

18. By Act of Congress of June 21, 1934, U. S. C. A. Title 45, Sec. 153, entitled "An Act to Amend the Railway Labor Act Approved May 20, 1926, and to Provide for the Prompt Disposition of Disputes Between Carriers and Their Employes", there was established a Board known as the "National Railroad Adjustment Board" with jurisdiction over disputes growing out of the interpretation or application of agreements between railroads and their employes concerning rates of pay, rules or working conditions after such disputes shall have been handled by negotiations up to and including the chief operating officer of the carrier designated to handle such disputes in the event that such negotiations shall have failed to result in adjustment. It was further provided in said Act that said Adjustment Board should be composed of four divisions of which the First Division should have jurisdiction over disputes involving yard and train service employes, including engineers, firemen, conductors, trainmen, and yard service employes. It was provided that said First Division should consist of ten members, five of whom should be selected and designated by the carriers and five of

whom should be selected and designated by national labor unions of employes, and said Board and said First Division thereof were thereafter organized.

19. Thereafter there was presented to the plaintiff by representatives of the firemen, enginemen and trainmen employed by the plaintiff a claim to the effect that certain work being performed on the property of the plaintiff by road engines manned by road engine crews of the Tenant Lines as above described in paragraph 10 hereof was work to which yard engine crews employed by the plaintiff were alleged to be exclusively entitled by reason of seniority rights under said agreement of February 1, 1923, above referred to (Exhibit D hereto), and after negotiations between said representatives and plaintiff had failed to result in agreement said representatives on March 29, 1937, invited the plaintiff to join with them in the submission of the said claim to the National Railroad Adjustment Board, First Division, which plaintiff declined to do on the ground that said claim was not based on any violation of any agreement and amounted to a demand that operating practices should be abandoned which had always existed continuously since the commencement of the operation of the Terminal. Notwithstanding such refusal by plaintiff to join voluntarily in the submission of said claim to said National Railroad Adjustment Board, a claim was thereafter filed by said representatives of said employes with said National Railroad Adjustment Board, First Division, the statement of said claim reading in part as follows:

"Statement of Claim:

"It is the practice of The Washington Terminal Company to require tenant line road engines manned by tenant line road engine crews to move dead equipment from the depot to the coach yards, move dead equipment from the coach yards to the depot and perform other switching service on tracks of the Washington Terminal Company. . . . Train and enginemen of the Washington Terminal Company claim that all such work should be performed by men holding seniority exclusively on the rails of the Terminal Company."

20. Thereafter the plaintiff was notified and required by the National Railroad Adjustment Board, First Division, in accordance with its rules as hereto attached and made a part hereof as Exhibit E, to file its "submission" in answer to the claim set forth in paragraph 19 above within thirty days after the claim was filed with said Board and within said thirty days the plaintiff filed its submissions with the Board.

21. Thereafter said National Railroad Adjustment Board, First Division, set a date upon which plaintiff and representatives of the firemen, enginemen and trainmen employed by the plaintiff were notified to appear before it in connection with the claim above referred to.

22. On said date, said representatives of the employes and a representative of the plaintiff appeared before said Board at Chicago, Illinois. In accordance with the established procedure of said National Railroad Adjustment Board, First Division, no witnesses were called to testify and no evidence was produced of the facts relied upon by the representatives of the employes in support of the aforesaid claim, but

said representatives of the employes made certain statements which they alleged to be facts and which were received by the Board without any opportunity being given to the plaintiff to cross-examine the said representatives or otherwise to test the competency of the said statements or verify their existence as facts.

23. At hearings before said Board the established procedure of said Board affords no opportunity to parties against whom claims have been filed to produce witnesses or by other means to introduce evidence in resisting such claims and the established procedure of said Board makes no provision for and does not permit the making of any record, stenographic or otherwise, of the proceedings before said Board. In accordance with said procedure no opportunity was given to the plaintiff to produce witnesses or by any other means to introduce evidence in resisting the claim presented by the representatives of said employes and no record was made of said hearing.

24. Thereafter said Board was apparently unable to reach a determination of the aforesaid claim through deadlock or inability to secure a majority vote of Division members and acting under the provisions of Paragraph (l) of Section 3 of said Railway Labor Act designated a referee to determine the said matter.

25. In accordance with the established practice of said Board no opportunity was given to the plaintiff to appear before the said referee and defend itself against said claim either by the presentation of evidence or argument, or to present written argument to said referee, and the plaintiff was not notified by said Board that a referee had been designated to make an Award.

26. Thereafter said referee decided said claim in favor of the employes and said decision was adopted, promulgated and published by the National Railroad Adjustment Board in the form hereto attached as Exhibit "F", consisting of a complete verbatim reproduction of the *ex parte* submission of the employes filed with the Board, a complete verbatim reproduction of plaintiff's submission likewise filed with the Board, followed by the words set forth below:

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The work described in this docket, is within the jurisdiction of the men holding seniority exclusively on the rails of the Washington Terminal Company.

AWARD

"Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD

By order of First Division

ATTEST (s) T. S. McFARLAND

Secretary."

"Dated at Chicago, Illinois, this 24th day of October, 1938."

27. Thereafter said National Railroad Adjustment Board, First Division served upon the plaintiff an Order dated October 24th, 1938 in words and figures as follows:

"Form 2

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

ORDER

To accompany { Award No. 3115
Docket No. 5059

To: THE WASHINGTON TERMINAL COMPANY

MR. B. R. TOLSON, *Manager*,
Union Station, Washington, D. C.

The WASHINGTON TERMINAL COMPANY

is hereby ordered to make effective Award No. 3115, made by the First Division of the National Railroad Adjustment Board (copy of which is attached and made part hereof), as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the Award on or before November 23rd, 1938.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of First Division

ATTEST: (Sgd) T. S. MCFARLAND,
Secretary.

Dated at Chicago, Illinois, this 24th day of October, 1938."

28. Plaintiff has not complied with said Order, but since the date thereof movements of the character referred to in paragraph 10 above have continued to be made, where in the judgment of the managing officers of the plaintiff, promptness or efficiency in the operation of said Terminal would be thereby promoted, by road engines manned by road engine crews of the Tenant Lines as has been the continuous practice since the commencement of the operation of the Terminal; and accordingly under paragraph (p) of Section 3 of the Railway Labor Act, (U. S. C. Title 45, Sec. 153), the defendants herein or any of them, as firemen or enginemen employed by the plaintiff in the operation of its yard engines and therefore as persons for whose benefit said Order was made, have been at all times since the date of said order, and are, authorized and empowered to file in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which any such employe resides, a petition praying said Court to make such order and enter such judgment as may be appropriate to enforce said order and in such proceeding said Court is empowered to make such order and enter such judgment as it may determine to be proper to enforce *or set aside* said order; but none of the defendants has heretofore filed such petition in this or any other District Court of the United States.

29. Notwithstanding that none of the defendants herein has instituted any proceeding in any competent court under section 3 (p) of said Railway Labor Act wherein plaintiff would have opportunity and be entitled to show that the defendants do not have any right under said contract of February 1, 1923 (Exhibit D) or otherwise, to perform movements of the character described in paragraph 10 above, and wherein plaintiff might pray said court to set aside said order of the National Railroad Adjustment Board, First Division, of October 24, 1938, as unlawful, invalid and in excess of the jurisdiction of said Board, none-the-less said defendants and each of them have, beginning November 23, 1938, presented, and are continuing to present to plaintiff claims and demands for sums of money other than the full day's wages which said defendants earn for each day on which they actually do any work, said demands being based upon their alleged right to perform movements of the character described in paragraph 10 above, which movements they are not in fact performing but which are being performed by road engine crews of the Tenant Lines. Said demands so made upon the plaintiff by defendants are in the nature of claims for penalty payments and are in excess of the amounts which such defendants would earn if they actually performed work of the character to which they claim they are entitled, many such demands being for another full day's pay in addition to the full day's pay which claimants are already earning, said claim for such extra day's pay being based upon the fact that the claimant has not been given an opportunity to perform some one specific movement of the character mentioned in paragraph 10 above, the performance of which movement would involve only a few minutes work. Such claims and demands are rapidly accumulating from day to day and already amount for the period beginning November 23, 1938, to a total of approximately $7,500.00 or at the rate of approximately $80,000.00 per annum.

30. Said claim of defendants that yard engine crews employed by plaintiff have an exclusive right to perform movements of the character described in paragraph 10 above, on which claim the demands of the defendants for the money payments mentioned in paragraph 28 above are based, is not legally supported by the provisions of said contract of February 1, 1923, above referred to (Plaintiff Exhibit D), or any other contract between plaintiff and defendants, or to the benefits of which defendants are entitled.

31. Said claim of defendants that yard engine crews employed by plaintiff have an exclusive right to perform such work is not legally supported by said award and order of said National Railroad Adjustment Board of October 24, 1938, because said award and order insofar as they purport or attempt to create such a right are unlawful, invalid, void and in excess of the jurisdiction of said Board for the following reasons:

(a) Said award and order purport to establish rights and impose obligations not founded upon any contract between the plaintiff and its employes, but are contrary to and in conflict with said contract of February 1, 1923 (Plaintiff Exhibit D), and amount to an attempt by said Board to impose upon plaintiff and its employees a new and dif-

ferent contract from that which exists between them, which is in excess of the jurisdiction of said Board to do, and would constitute a deprivation of plaintiff's liberty and property without due process of law in violation of the provisions of Article V of the Constitution of the United States;

(b) Said award and order were made without the due process of law to which plaintiff is entitled under said Article V of the Constitution of the United States in that they were made without a proper or adequate hearing, because made under a procedure which allowed plaintiff no opportunity to test the statements of the claimants by cross-examination, no opportunity to present oral evidence before said Board, and no opportunity to present argument before the referee who decided the dispute and made the award;

(c) Said award and order are totally unsupported by the facts set forth in plaintiff's Exhibit F, which constitutes the only record, or substitute for a record, of the proceedings before said Board on which said order and award purport to be based;

(d) Said award and order made by the National Railroad Adjustment Board were not made by a tribunal exercising judicial power under Article III of the Constitution of the United States and said Board cannot consistently with said Article III of the Constitution of the United States be vested with jurisdiction to construe finally and conclusively the contract rights existing between plaintiff and its employees or other private persons.

32. Plaintiff is without an adequate and complete remedy at law in the premises, and for want of such remedy is subjected to serious damage and inconvenience, for the following reasons, to wit:

None of the defendants has at this time instituted any judicial proceeding wherein plaintiff would have the opportunity and right to show that defendants do not have any right under said contract of February 1, 1923 (Exhibit D hereto) or otherwise to perform movements of the character as to which they claim such right, and there is no means by which plaintiff can force or induce the defendants or any of them to institute such proceedings. Said Railway Labor Act provides no method whereby plaintiff may petition any court of competent jurisdiction to set aside said award and order of said National Railroad Adjustment Board, First Division, as a result of which award the defendants have made and are continuing to make the demands for money payments mentioned in paragraph 28 above and meanwhile said demands are accruing and accumulating from day to day in large amounts. Plaintiff states that although the issues upon which the validity of said demands and the liability of plaintiff to satisfy them are as a matter of evidence and proof capable of determination at this time, the plaintiff by reason of there being no judicial determination of plaintiff's liabilities with respect to such demands is compelled to maintain and make available substantial amounts of money to satisfy said demands in the event that the defendants or any of them should subsequently institute legal proceedings to enforce said award and order, and in the event it should in such proceedings be determined that the plaintiff is legally liable with respect thereto. Furthermore, plaintiff if advised at the present

time by proper judicial construction of its rights and liabilities under its contract with the defendants would, if necessary, be enabled by making readjustments of its operating arrangements to fulfill its obligations to defendants at less expense than by incurring the heavy penalty payments which the defendants are now demanding. Plaintiff further avers that so long as the defendants continue to make such demands without instituting legal proceedings wherein the validity of such demands can be adjudicated, and so long as the present controversy between the plaintiff and defendants with respect to their respective rights and liabilities under the contract which exists between them remain without judicial determination, a serious impediment exists to the proper and adequate fulfillment of plaintiff's obligation to serve the public which may, as a result of delay in securing an adjudication that will settle such controversy, ultimately impair and interrupt the performance of such service.

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33. The plaintiff avers that by reason of each and all the facts aforesaid the only remedy of this plaintiff, in order to avoid irreparable injury and damage, is to bring this suit in equity in this Honorable Court, praying a declaratory judgment or decree on the part of this Court relative to the actual controversy hereinbefore set out, and a declaration of the rights and other legal relations of the parties hereto, with respect to such controversy.

Wherefore, plaintiff prays your Honorable Court to render a declaratory decree or judgment declaring that the contract between the plaintiff and the classes of employees of which defendants are members, dated February 1, 1923 (Exhibit D hereof) does not give to the said defendants the right to perform the work of: (a) moving empty passenger trains which have discharged their passengers at the Station to the storage yard; (b) moving trains of empty passenger cars from the Storage Yard to the Station for the purpose of taking on passengers and leaving for their destination; (c) cutting off one or more cars from the head end of a train of passenger cars that has come into the Station and moving the said car or cars in one movement to a designated track; (d) moving one or more cars from a track and placing the same against and coupling said car or cars onto a train of passenger cars standing in the Station so as to form a part of the said train departing from the Station on its journey over the road; (e) moving empty passenger trains which have come into the Station and from which the passengers have been discharged a sufficient distance to permit the road engine which has brought such train into the Station to be uncoupled from the said train and to proceed by a crossover movement to another track;

And further declaring that plaintiff has the right under the said contract to continue to permit the said movements to be made by road engines of the Tenant Lines manned by road engine crews employed by the Tenant Lines wherever said movements by said Tenant Line road engines and road engine crews, in the judgment of the officers of the plaintiff, will promote efficiency or promptness in the operation of the Terminal;

And further declaring that said Award No. 3115, Docket 5059 and Order of the National Railroad Adjustment Board, First Division,

entered thereon, do not lawfully confer any right upon the defendants to perform the work of making such movements, and that said Award and Order in so far as they purport to confer any such right are invalid and of no legal force and effect;

And further declaring that the defendants herein have no legal right to perform the work of making such movements or any of them;

And further declaring that the claims and demands made by the defendants upon the plaintiff for the payment of money for movements of the character above described, which movements defendants have not been assigned to make but which have been made by road engines manned by road engine crews employed by the Tenant Lines, are invalid and unlawful, and that the plaintiff is under no legal liability to satisfy such claims or demands, or any of them;

And further declaring the rights and other legal relations of the plaintiff and defendants as herein averred and granting to this plaintiff such further relief as to this Court may seem meet and proper in the premises.

Sydney R. Prince Jr

[redacted]

Guy W Knight

[redacted]

John Dunkinson

[redacted]

Solicitors for Plaintiffs.

Dated at Washington, D. C.
this 29th day of December, 1938.

EXHIBIT A.

THE WASHINGTON TERMINAL COMPANY

REGULATIONS AND RATES OF PAY FOR THE GOVERNMENT OF FIREMEN

RATES OF PAY EFFECTIVE JUNE 1, 1910

REGULATIONS EFFECTIVE MAY 1, 1911

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THE FOLLOWING RULES AND REGULATIONS ARE FOR THE GOVERNMENT OF WASHINGTON TERMINAL FIREMEN.

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1. Ability, fitness and seniority entitle firemen to promotion as opportunity may offer. The Superintendent shall decide whether the candidate or applicant is qualified therefor. Firemen passed around for promotion will, if they so desire, be informed, upon request to the Superintendent, the reason for so doing.

2. A fireman cannot make application for the run that he has just vacated, but if the run is vacated by the man who fills his vacancy, he may then make application, and his application must be considered. Demoted enginemen will be given runs to which their seniority entitles them.

3. Firemen successfully passing the necessary examination for promotion to enginemen shall receive a letter to that effect, signed by the Superintendent.

4. Firemen will be considered in connection with special duty pertaining to locomotives.

5. All extra firemen will be run first in, first out.

6. Firemen accepting promotion to official positions may retain their seniority as firemen.

Firemen in yard service will receive not less than 26 cents per hour.

7. Ten hours or less shall constitute a day; overtime at regular hourly rates. Overtime to be computed for each employe on the basis of actual overtime worked or held for duty, allowing time to the nearest tenth of an hour.

8. Regularly assigned firemen will not be used for extra service when competent extra firemen are available.

9. Firemen of single-crewed yard engines will report for duty within such time to reach the appointed place, and will be paid to the nearest tenth of an hour, with a maximum of thirty minutes in addition to the regular day's pay for reporting in advance of commencing day's work.

10. Regularly assigned firemen reporting for duty and through no fault of their own not used as assigned, will be paid for the time held on duty; a minimum of ten hours will be allowed.

11. Firemen used as pilots will receive engineman's pay.

12. Firemen called as witnesses in court or to attend an inquest, in the interest of the railroad company, will be allowed time for same, with a minimum of one day; also traveling expenses and board when away from home.

13. Firemen required to do any work outside of their regularly assigned duties will be paid their regular wages, except when filling positions that pay a higher rate, they will receive the higher rate.

14. One hour without pay will be allowed for meals between the hours of 11.00 A. M. and 1.00 A. M. or P. M. for yard firemen working between the hours of 6.00 A. M. and 7.00 P. M., or between the hours of 6.00 P. M. and 7.00 A. M. If not relieved for meals until 12.30 A. M. or P. M., they will be given thirty minutes within which to eat and be paid for the hour.

One hour without pay will be allowed for meals between the hours of 6.00 P. M. and 8.00 P. M. or A. M. for yard firemen working between the hours of 12.00 noon or midnight, and 1.00 A. M. or P. M. If not relieved for meals until 7.30 P. M. or A. M., they will be given thirty minutes within which to eat and be paid for the hour.

15. When time claimed is not allowed, firemen will be notified in writing, and the reason therefor given.

16. When yard firemen are required to report for investigation after having finished their work they shall be given an audience promptly after being relieved. If found not guilty they will be allowed time held for investigation at their regular hourly rates.

17. If a yard fireman should consider that an injustice has been done him he should appeal in writing to the Superintendent within ten days.

18. Yard firemen relieved from service, through reduction of force, will be given preference in re-employment if available, and previous service has been satisfactory.

19. In filling positions that can be taken by permanently disabled yard firemen preference will be given such employes as are capable of performing the service.

20. Awnings will be placed on all yard engines in yard service and substantial arrangements shall be attached to all engines to afford the firemen protection against inclement weather.

21. A classified roster will be posted once a year in the Round House, giving dates of employment of firemen and the dates of their promotion.

22. Firemen transferred from the P. B. & W. R. R. Co., B. & O. R. R. Co., and Southern Railway Co. to the Washington Terminal Company will be given seniority as is shown on the official roster, dated May 1, 1911.

23. Water coolers and tin cups will be placed on all yard engines in yard service and ice will be furnished from April 1st to October 1st.

24. Firemen eligible for promotion to enginemen will be given three examinations; failing to pass the first examination, they will be allowed thirty days to prepare for the second examination, and failing to pass the second examination will be allowed an additional thirty days to prepare themselves. If they successfully pass the second or third examination they will be senior to any junior firemen who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination they will be dropped back to the youngest extra fireman, and can only come up again in their turn. This shall not be retroactive. Firemen entitled to promotion who are injured or unable to take the examination by reason of sickness, suspension or leave of absence shall not lose their turn thereby.

25. Firemen who have been in the Company's service six months, will, if they so desire, be given service letter by the Superintendent when leaving the service, which they must sign when presented.

26. A fireman may be given ninety days furlough and at the expiration of that time may, upon making application to his proper officer, resume his employment without losing his seniority.

27. Yard firemen will report for duty and be relieved, as nearly as practicable, at specified points; when not so relieved they will be considered on duty. Yard firemen waiting at specified relieving points will be considered on duty.

28. A squirt hose will be maintained on all yard engines at all times.

29. Firemen will not be required to polish brass, clean engines, black front ends or clean fires, but they may do so. Firemen will be required to keep the woodwork and all parts inside of cab, including glass inside and outside of cab, in a cleanly condition, in the judgment of the General Foreman.

They will not be required to fill lamps. This regulation is not to be construed as relieving firemen from knowing that all lamps and signals required are in serviceable condition at all times.

30. New runs and permanent vacancies in yard engine crews, will be advertised on bulletin board for five days, and at the expiration of that time given to the oldest fireman in the service making application in writing, if, in the judgment of the Superintendent, he is qualified therefor. Failure to make application in writing for a new run or position precludes promotion to that run or position.

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Firemen making application for a new run or vacancy must file the same with the officer signing the advertisement, and will receive acknowledgment thereof from him.

31. Firemen will not be required to cut hose, cut engines, or throw switches, but they may do so in emergencies.

32. Promoted firemen shall hold their regular assignments firing and be worked first in first out on the extra engineman's list until they receive regular assignment as enginemen; seniority to rank from date of promotion.

33. Yard firemen will not be suspended nor dismissed from the Company's service without a fair and impartial trial; neither will they be suspended for minor offences pending investigation or decision. Witnesses will be examined separately, but in the event of conflicting testimony those whose evidence conflicts will be examined together.

34. Any engineman, fireman or hostler who considers that an injustice has been done him, and having appealed his case in writing to the Superintendent, and after his appeal has been acted upon by the Superintendent may, if he so desires, be represented before the Superintendent by a committee representing the firemen, except in case of an engineman such committee should consist of promoted men.

A. M. KEPPEL,
Superintendent.

EXHIBIT B.

THE WASHINGTON TERMINAL COMPANY

REGULATIONS AND RATES OF PAY FOR THE GOVERNMENT OF ENGINEMEN

RATES OF PAY EFFECTIVE SEPT. 1, 1911

REGULATIONS EFFECTIVE MARCH 1, 1912

THE FOLLOWING RULES AND REGULATIONS ARE FOR THE GOVERNMENT OF WASHINGTON TERMINAL ENGINEMEN.

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1. Ability, fitness and seniority will entitle enginemen to promotion as opportunity may offer.

2. New runs, permanent vacancies and working hours of any run permanently changed will be advertised on the bulletin board for five days, and at the expiration of that time given to the oldest engineman making application in writing, if in the judgment of the Superintendent, he is qualified therefor.

3. Regularly assigned enginemen will not be used for extra service when extra enginemen are available.

4. Enginemen assigned to regular yard work will be assigned to regular engines. This arrangement will be varied from as may be necessary.

5. In reduction of force, seniority will prevail.

6. Enginemen will be considered in connection with special duty pertaining to locomotives.

7. Ten hours or less shall constitute a day; overtime at regular hourly rates. Only full hours will be counted; thirty minutes or more will be counted one hour, less than thirty minutes will not be counted.

8. Enginemen when called for duty and not used, through no fault of their own, will be paid for three hours.

9. Enginemen of single-crewed yard engines will report for duty at the appointed time, and will receive one half hour's pay in addition to regular day's pay for preparatory work.

10. Enginemen in yard service will receive not less than 41.5 cents per hour.

11. Enginemen will not be suspended nor dismissed from the company's service without a fair and impartial trial. Neither will they be suspended for minor offences pending investigation or decision. Witnesses will be examined separately, but in event of conflicting testi-

mony, those whose evidence conflicts will be examined together. Enginemen will receive five days notice prior to the date suspension takes effect. If an engineman should consider that an injustice has been done him, he should appeal in writing to the Superintendent within five days.

12. Enginemen called as witnesses at court or to attend an inquest, in the interest of the railroad company, will be allowed time for same, with a minimum of one day; also traveling expenses and board when away from home.

13. Enginemen will not be required to fill grease cups on yard engines. They must report when this attention is necessary.

14. One hour without pay will be allowed for meals between the hours of 11.00 A. M. and 1.00 A. M., or P. M., for yard enginemen working between the hours of 6.00 A. M. and 7.00 P. M., or between the hours of 6.00 P. M. and 7.00 A. M. If not relieved for meals until 12.30 A. M. or P. M., they will be given thirty minutes within which to eat and be paid for the hour.

One hour without pay will be allowed for meals between the hours of 6.00 P. M. and 8.00 P. M. or A. M. for yard enginemen working between the hours of 12.00 noon and midnight and 1.00 A. M. or P. M. If not relieved for meals until 7.30 P. M. or A. M., they will be given thirty minutes within which to eat and be paid for the hour.

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15. When time claimed is not allowed, enginemen will be notified in writing and the reason therefor given.

16. When yard enginemen are required to report for investigation after having finished their work they will be given an audience promptly after being relieved. If found not guilty they will be allowed time held for investigation at their regular hourly rates.

17. Enginemen will not be required to report more than six hours before going on duty after being absent.

18. When working hours of any run are changed, causing same to be advertised, the engineman holding run prior to change will be permitted to hold run during advertisement.

19. Temporary vacancies for any cause known to be thirty days or more will be advertised for three days and given to the oldest engineman making application in writing, if in the judgment of the Superintendent he is qualified therefor. This is known to be only a temporary assignment.

20. When enginemen are absent for any cause when vacancies are advertised in accordance with Rules 2 and 19, they will be permitted to make application for vacancies advertised during their absence, provided they do so within five days after returning to work.

21. A classified roster will be posted once a year in the Engine House, giving dates of employment of enginemen and the dates of their promotion.

22. Enginemen transferred from the P. B. & W. R. R. Co., B. & O. R. R. Co., and Southern Railway Company to the Washington Terminal Company will be given seniority as is shown on the official roster dated February 1, 1912.

23. Water coolers and tin cups will be placed on all yard engines in yard service and ice will be furnished from April 1st to October 1st. Awnings will be provided on all yard engines.

24. An engineman may be given ninety days furlough and at the expiration of that time may, upon making application to his proper officer, resume his employment without losing his seniority.

25. Yard enginemen will report for duty and be relieved as nearly as practical at specified points. When not so relieved, they will be considered on duty. Yard enginemen waiting at specified relieving points will also be considered on duty.

A. M. KEPPEL,
Superintendent.

EXHIBIT C.

UNITED STATES RAILROAD ADMINISTRATION

DIRECTOR GENERAL OF RAILROADS

WASHINGTON TERMINAL RAILROAD

SCHEDULE OF

RULES AND RATES OF PAY

FOR

ENGINEMEN, FIREMAN AND YARDMEN

(IN THE OPERATION OF TRAINS OR ENGINES PROPELLED BY STEAM OR OTHER MOTIVE POWER)

EFFECTIVE DECEMBER 1, 1919

ARTICLE 1.

RATES OF PAY.

Weight on drivers	(per day)	(per day)	(per day)
Less than 140,000 lbs.	$5.60	$4.16	$4.16
140,000 to 200,000 lbs.	$5.76	$4.28	$4.16
200,000 to 300,000 lbs.	$5.92	$4.40	$4.16
300,000 and over	$6.08	$4.56	$4.32
Mallets under 275,000 lbs.	$6.68	$5.28	....
Mallets 275,000 lbs. and over	$6.92	$5.52	....
Inside Hostlers			$4.16
Outside Hostlers			$4.80
Hostler Helpers			$3.60
Conductors			$5.33
Brakemen			$5.00
Switchtenders			$4.00

ARTICLE 2.

BASIC DAY.

Eight hours or less shall constitute a day's work.

ARTICLE 3.

OVERTIME.

Except when changing off, where it is the practice to work alternately days and nights for certain periods; working through two shifts

to change off; or where exercising seniority rights from one assignment to another; or when extra men are required to be used by schedule rules—any rules to the contrary to be changed accordingly—all time worked in excess of eight hours continuous service in a twenty-four-hour period shall be paid for as overtime on the minute basis at one and one-half times the hourly rate.

EXAMPLE.

What compensation should be allowed for additional service where a crew is regularly assigned to work 12 midnight to 8 a.m. and (service performed not affected by exceptions outlined in this rule):

Question. (a) Is required to cover the third shift on the same day 4.00 p.m. to 12 midnight?

Answer. (a) Eight hours at time and one-half.

Question. (b) Is required in an emergency to work 8.30 a.m., until 11.30 a.m.?

Answer. (b) Eight hours at time and one-half.

Question. (c) Is required in an emergency to work 8 p.m. to 12 midnight (four hours) on the same day?

Answer. (c) Eight hours at time and one-half.

Question. (d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11 p.m. and being relieved at 7 a.m., and consequently in the 24-hour period works nine hours, but not more than eight hours on a shift?

Answer. (d) On account of complying with the 48-hour provision, which makes it permissible to change beginning time, crews only entitled to a minimum day.

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ARTICLE 4.

ASSIGNMENTS.

Enginemen, Firemen and Yardmen shall be assigned for a fixed period of time, which shall be for the same hours daily for all members of a crew. So far as it is practicable, assignments shall be restricted to eight hours' work.

Enginemen assigned to regular yard work will be assigned to regular engines if practicable.

ARTICLE 5.

STARTING TIME.

(a) Regularly assigned yard crews shall each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours' advance notice.

(b) Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between the hours of 6.30 a.m. and 8 a.m.; the second 2.30 p.m. and 4.00 p.m.; and the third 10.30 p.m. and 12.00 midnight.

(c) Where two shifts are worked in continuous service, the first shift may be started during any one of the periods named in Section (b).

(d) Where two shifts are worked not in continuous service, the time for the first shift to begin work will be between the hours of 6.30 a.m., and 10.00 a.m., and the second not later than 10.30 p.m.

(e) Where an independent assignment is worked regularly, the starting time will be during one of the periods provided in Sections (b) or (d).

ARTICLE 6.

Calculating Assignment and Meal Periods.

The time for fixing the beginning of assignments or meal periods is to be calculated from the time fixed for the crew to begin work as a unit, without regard to preparatory or individual duties.

ARTICLE 7.

Lunch Time.

(a) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work, without deduction in pay.

(b) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

ARTICLE 8.

Seniority.

(a) Ability, fitness and seniority entitle Enginemen, Firemen and Yardmen to promotion as opportunity may offer. Enginemen, Firemen and Yardmen passed around for promotion, will, if they so desire, be informed upon request to the Superintendent, the reason for the same.

(b) The order of promotion for Yardmen will be from senior extra Brakeman to regular Brakeman; senior regular promoted Brakeman to extra Conductor; senior extra Conductor to regular Conductor. Failure to make application for a promotion or the refusal of promotion by Yardmen holding seniority rights to entitle them to such promotion, places them behind the last regular Yardman holding a regular assignment. Yardmen desiring to be demoted of their own accord will return to the foot of the extra Brakemen's list, unless incapacitated by sickness or injury, request to be made in writing.

(c) Firemen and Yardmen eligible to promotion to Enginemen and Conductors will be given three examinations. Failing to pass the first examination, they will be allowed thirty days to prepare themselvs for a second examination and failing to pass the second examination will be allowed an additional thirty days to further prepare themselves. If they successfully pass the second or third examination, they will hold seniority over any junior Firemen or Yardmen, who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination, the Firemen so doing will be dropped to the youngest extra Firemen and can only come up again in his turn, the Yardmen so doing will be placed behind the last Yardman holding a regular assignment. This shall not be retroactive. Firemen and Yardmen entitled to promotion, who are injured or unable to take the examination by reason of sickness, suspension or leave of absence, shall not lose their turn thereby.

(d) Enginemen, Firemen and Yardmen transferred from the P. B. & W. R. R., the B. & O. R. R. and the Southern Railway to the Washington Terminal Railroad will be given seniority as shown on the official roster of Enginemen dated February 1, 1912; Firemen dated May 1, 1911; and Yardmen dated April 1, 1911.

(e) A classified roster will be posted adjacent to the Crew Board and at the Engine House, giving dates Enginemen, Firemen and Yardmen entered service, also the date of their promotion. Men so promoted will retain their seniority. The classified roster will be revised every six months.

(f) When additional Conductors are needed, a list of the senior eligible Brakemen will be posted ten days prior to the examination.

(g) The senior promoted Brakeman on crews will be eligible to take charge of crews, when the regular Conductor is absent.

(h) In reduction of force and rearrangement of crews consequent thereto, seniority of Enginemen, Firemen and Yardmen shall govern. Enginemen, Firemen and Yardmen relieved from service through reduction in force, will be given preference in re-employment.

(i) Yardmen absent without leave, will at the expiration of thirty days, be considered as having left the service unless application is made to the proper officer within that period.

(k) Enginemen, Firemen and Yardmen discharged from service will lose their seniority unless reinstated within six months from date of discharge; Enginemen, Firemen and Yardmen leaving the service of their own accord, lose their seniority.

(l) All extra Enginemen, Firemen and Yardmen will be worked first in, first out. Extra Enginemen will be regularly assigned as Firemen and the number of such will not exceed five on each trick of duty. The senior demoted Engineman on each trick should be used to fill vacancies on that trick after the above five assigned extra Enginemen are used.

(m) Switchtenders will have no seniority as Conductors or Brakemen; Conductors and Brakemen will have no seniority as Switchtenders.

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(n) Enginemen, Firemen and Yardmen may be given ninety days furlough and at the expiration of that time may, upon making application to the proper officer, resume employment without the loss of seniority.

ARTICLE 9.

Advertising.

(a) New runs, permanent vacancies and the working hours of any run permanently changed, will be advertised on the Bulletin Board for three days and at the expiration of that time will be given to the senior Engineman, Fireman or Yardman in the service making application in writing. Enginemen, Firemen or Yardmen making application for a new run or vacancy must file the same with the officer signing the advertisement, and will receive from him an acknowledgment thereof.

(b) Vacancies caused by sickness, injury or absence from duty will be known as temporary vacancies. Such vacancies will, at the expiration of five days, be advertised upon the Bulletin Board for a period of three days and at the expiration of that time will be given to the senior Engineman, Fireman or Yardman in service making application therefor. Temporary vacancies created by the advertisement as above, will be likewise advertised starting on the first day the vacancy is created in each case and filled in like manner, and so on until all vacancies are filled.

(c) Firemen failing to make application in writing for a new run or vacancy precludes promotion to that run or vacancy. A Fireman can not make application for a run that he has just vacated, but if the run is vacated by the man who fills his vacancy, his application will then be considered. Enginemen demoted to Firemen will be given runs to which their seniority as Firemen entitle them.

(d) When working hours of any run are changed causing the run to be advertised, the Engineman, Fireman or Yardman holding the run prior to the advertisement will be permitted to hold run during the same. When Enginemen, Firemen or Yardmen are absent for any cause when vacancies are advertised, they will be permitted to make application for vacancies occurring during their absence, provided they do so within three days after returning to work.

ARTICLE 10.

Discipline.

(a) Enginemen, Firemen and Yardmen will not be discharged or suspended without a just and sufficient cause; neither will they be suspended for minor offenses pending investigation. In case an Engineman, Fireman or Yardman is taken out of service for other than a minor offense, he will be given a hearing and a decision rendered within five days. If found guilty and a verdict of suspension is rendered, it shall be for a given length of time and the employe so notified in writing. The suspension will begin from the time first relieved from duty. If found not guilty of charges, Enginemen, Firemen and Yardmen shall be reinstated and paid for all time lost.

(b) When an Engineman, Fireman or Yardman is brought to trial for an offense, the charge shall be specific. He shall have the right to be accompanied by the Chairman of his respective committee or other employee of his choice and to be represented by the same party accompanying him. He shall also have the right to produce witnesses in his own defense at such examinations or investigations and to examine all papers relative to his case. Witnesses will be examined separately, but in the event of conflicting testimony, those whose evidence conflicts, will be examined together. Enginemen, Firemen and Yardmen shall be given five days' notice prior to date of suspension. In case of appeal, the duly constituted Committees will, upon request, be furnished a transcript of all proceedings of the case.

(c) Enginemen, Firemen and Yardmen not at fault and required by the Railroad to be present at investigations as witnesses will be paid for all time lost at their regular rates upon the minute basis. Enginemen, Firemen and Yardmen who are required to report for investigations after having finished their assignments, shall be given an audience promptly after being relieved. They will be allowed compensation for all time held from the time relieved from duty until relieved from the investigation.

(d) Enginemen, Firemen and Yardmen attending court or inquests under instructions from the Railroad, will be allowed compensation for the same with a minimum of one day; if court or inquest is held away from their home, they will be allowed traveling expenses and board in addition.

(e) If an Engineman, Fireman or Yardman should consider that an injustice has been done him, he may appeal to the Superintendent within ten days in writing. Any Engineman, Fireman or Hostler, who considers that an injustice has been done him, and having appealed his case in writing to the Superintendent, and after the Superintendent has acted upon his appeal, may, if he desires, be represented by a committee representing the Firemen, except in case of an Engineman, such committee should consist of promoted men.

ARTICLE 11.

Time.

(a) Time of Enginemen, Firemen and Yardmen will begin when they are required to report for duty and continue until they are relieved from duty. They will report for duty and be relieved from duty at specified points; when not so relieved and while waiting at specified points they will be considered on duty.

(b) Unless previously notified that they will not be needed, regularly assigned Enginemen, Firemen and Yardmen as well as extra Enginemen, Firemen and Yardmen filling extra assignments, reporting for duty or called for duty and not used, and regular and extra Enginemen, Firemen and Yardmen working less than eight hours,

will be paid a minimum of eight hours, provided they do not discontinue work of their own accord or are assigned to other duties.

(c) Enginemen of single crewed and double crewed engines will report for duty at the appointed time and will receive one half hour's pay in addition to the regular day's pay for preparatory work. Firemen of single or double crewed engines will report for duty within such time to reach the appointed place and will be paid to the nearest tenth of an hour with a maximum of thirty minutes in addition to the regular day's pay for reporting in advance of commencing work.

(d) Enginemen and Firemen will not be required to report more than four hours in advance of going on duty, after having been absent.

ARTICLE 12.

Engine Equipment.

(a) All engines working regular or extra in the yard shall be equipped with foot-boards and grab irons on the front and rear. Regularly assigned engines will be furnished with waterproof boxes to the front for the protection of yardmens' clothes and lunches.

(b) A squirt hose will be maintained on all yard engines at all times; water coolers and tin cups will be placed on all engines in yard service and ice will be furnished from April 1st to October 1st. Awnings will be placed upon all engines in yard service and substantial arrangements shall be attached to all engines to afford the Engineman and Fireman protection against inclement weather.

(c) Enginemen, Firemen and Yardmen will not be required to work with engines that blow steam to such an extent that the vision of signals is obscured.

ARTICLE 13.

Crew Consists.

Crews shall consist of a Conductor and at least two Brakemen at all times.

ARTICLE 14.

Special Duty and Yardmaster Positions.

(a) Enginemen and Firemen will be considered in connection with special duty pertaining to locomotives.

(b) Yard Conductors and Brakemen are eligible to promotion to the position of Yardmaster and Assistant Yardmaster and will be given preference in filling such positions.

EMPLOYES COVERED BY THIS SCHEDULE.

ARTICLE 15.

Definition and Duties.

(a) The word "Yardman" as herein used applies to Conductors, Brakemen and Switchtenders in yard service of the Washington Terminal Railroad.

(b) An Outside Hostler is a Hostler who handles engines between the passenger station and the enginehouse or yards or on main tracks; and must have at least 18 months' seniority as a Fireman on the official roster for Firemen; an Inside Hostler is a Hostler who handles engines in and about the engine house or within the confines of the engine terminal; the term "Hostlers' Helper" applies to employees used to assist outside hostlers.

ARTICLE 16.

Pilots and Back-up Men.

(a) Back-up Men will be classified as Conductors and paid Conductors' rate.

(b) Enginemen or Firemen used as Pilots will be allowed Enginemen's pay; Yardmen used as Pilots will be allowed Conductors' pay.

ARTICLE 17.

Outside Service.

(a) Yardmen required to attend switches or Enginemen, Firemen or Yardmen required to perform work outside of their regularly assigned duties, will be paid their regular rates except when filling positions that pay a higher rate, when they will receive the higher rate.

(b) In filling positions that can be taken by disqualified or permanently disabled Enginemen, Firemen or Yardmen, preference will be given such employees as are capable of performing the service.

ARTICLE 18.

Coupling Hose, Etc.

(a) Yardmen will not be required to cut steam hose, neither couple or cut off road engines. They may do so in emergencies; Yardmen will not be required to chain up or unchain cars, couple or uncouple hose in yards or on repair tracks, where Carmen are employed.

Note.—Yardmen will, if necessary to avoid delay to a passenger train, couple or uncouple air hose between engine and cars.

(b) Firemen will not be required to cut hose, couple up or cut off engines or throw switches, but they may do so in emergency.

ARTICLE 19.

Restrictions.

(a) Enginemen will not be required to fill or screw down grease cups on yard engines. They must, however, report when this attention is necessary.

(b) Firemen will be relieved of cleaning engines; neither will they be required to clean fires. Lubricators will be filled, markers and other lamps cared for, including filling, but not lighting, and all supplies placed on engines at points where round house or shop forces are maintained. The Firemen shall not, however, be relieved of the responsibility of knowing whether the engines for which they are called, are properly equipped.

ARTICLE 20.

Experienced Men.

In the employment of Yardmen, experienced men will be given preference.

ARTICLE 21.

Service Letter.

Enginemen, Firemen and Yardmen, who have been in the Railroad's service for six months, will, if they so desire, be given a service letter signed by the Superintendent, when leaving the employment of the Railroad, which they must sign when presented. This letter will indicate the different services performed during employment.

ARTICLE 22.

Fines, Lamps, Etc.

(a) No fines shall be imposed upon Enginemen, Firemen or Yardmen.

(b) Yardmen will not be required to purchase globes or lamps.

ARTICLE 23.

Time Not Allowed.

When time claimed is not allowed, Enginemen, Firemen and Yardmen will be notified in writing and the reasons given therefor.

ARTICLE 24.

Rest Periods.

Rest periods will be regulated in accordance with the Federal Statute known as the "Sixteen-Hour Law." Enginemen, Firemen and Yardmen, who are relieved for rest in compliance with this law, shall be allowed to resume work when the lawful rest period is up and to work eight hours or be paid therefor.

DECISIONS OF THE COMMISSION OF EIGHT.

Decision No. 1. Effective 7-1-17

ARTICLE NO. 1.

Hours on Duty.

(a) Eight hours or less shall constitute a day's work. Overtime to be paid pro-rata actual minutes to be counted.

(b) Yard crews will be assigned for a fixed period of time per day, not to exceed ten hours except in isolated yards where only one yard crew is assigned and where the work requires it, the time of the assignment may be extended not to exceed twelve hours; under this exception, the minimum shall be ten hours.

(c) No new work will be given to a crew where the assignment is for 9 or more hours after the expiration of the period for which regularly assigned; overtime may be required in order to finish work that the crew is performing at the expiration of the assigned period or in emergencies. This will not be construed to extend the Company's rights under similar existing rules for 10-hour assignments.

(d) On assignment where the hours are limited to eight, overtime will be worked only in case of emergency; or in case of transfer crews or crews engaged in industrial work to finish assigned or programmed work, or in either case to get to regular relief points; the purpose being that if assigned or programmed service usually requires more than eight hours' work, the assignment should be extended to meet the requirements of the service, either 9 or 10 hours.

(e) Sections (a), (b), (c) and (d) will also apply to yard crews called or used in extra service. They shall not be construed to require railroads to pay yard crews for more than the minimum day plus the actual time consumed in excess of eight hours, except where the assignment is for either nine or ten hours the minimum shall be nine hours exclusive of the meal hour.

Questions and Answers, Supplement "B," for the Purpose of Information.

Question No. 7. Paragraph (c).

What constitutes new work as mentioned in this Article which stipulates that no new work will be given to a crew where the assign-

ment is for 9 or more hours after the expiration of the period to which regularly assigned?

Answer.

New work is such work as is not a portion of the regular programmed or routine work of a crew. If the regular work is made up of distinct portions, and a distinct portion remains to be performed after the hours of the assignment, such distinct portions are not new work. Work which is not a portion of the program or routine may be added to the program or routine prior to the end of the assigned hours, but not afterwards. Overtime may be worked to finish the programmed or routine work of an assignment. This is not to be construed as authority to work crews overtime when it can be avoided; nor is it to be construed as authority to program work when it is clearly known that portions of the programmed work, under ordinary conditions, can not be started until after the assigned period, or to require overtime on new work which is given to a crew prior to end of assigned period.

Question No. 8. Paragraphs (c) and (d).

What is the distinction between assigning "new work" and "overtime" in relation to paragraph (c) Artice 1?

Answer.

There is no difference regarding "new work"; the distinction lies in the fact that on an eight-hour assignment "overtime may" NOT "be required in order to finish work that the crew is performing at the expiration of the assigned period" except as stated: "only in case of emergency," or as further provided for transfer crews or crews engaged in industrial work.

Question No. 10. Paragraph (d).

What constitutes an emergency under this Article which provides that when assignments are limited to eight hours, overtime will be worked only in case of emergency, etc.?

Answer.

It is the intention of this paragraph, as well as paragraph (c) to restrict the hours of work to the assignment, either 8, 9 or more hours, and only such occurrences as can not be foreseen and requiring immediate attention can be considered emergencies.

Question No. 11.

Is it permissible to have regular crew on an assignment for a given number of hours, and have one or more members thereof on an assignment of a less number of hours?

Answer.

No regular member of the crew shall be assigned for a lesser number of hours than the number of hours for the crew as a unit.

ARTICLE NO. 2.

Lunch Time.

(a) Yard crews where the hours of work are limited to eight will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work without deduction in pay.

(e) In eight-hour yard assignments yard crews will not be required to work longer than 6 hours without being allowed 20 minutes, and in 9 or more hour assignments, 30 minutes for lunch, with no deduction in pay or time therefor.

Answer to Question 12.

Where paragraph (d), Article 2, is agreed to in lieu of former dinner-hour rules, which provided for a full hour without pay therefor, no penalty is attached thereto. Paragraph (e), Article 2, is mandatory, in that "yard crews WILL NOT be required to work longer than 6 hours without being allowed" stipulated time "for lunch," as is also the provision pertaining to "4½ and 6 hours," Article 2 paragraphs (a) and (b).

Question 13. Paragraphs (a), (b), (d) and (e).

Under the several provisions for meal periods, must they be given within the prescribed time?

Answer.

Yes. The lunch period must be given and COMPLETED within 4½ and 6 hours.

ARTICLE NO. 3.

(a) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours' advance notice.

(b) Where three 8-hour shifts are worked in continuous service the time for the first shift to begin work will be between 6.30 a.m. and 8.00 a.m.; the second 2.30 p.m. and 4.00 p.m.; and the third 10.30 p.m., and 12.00 midnight.

(c) Where two 8-hour shifts are worked in continuous service the first shift may be started during any one of the periods named in paragraph (b).

(d) Where two 8 or 9-hour shifts are worked not in continuous service the time for the first shift to begin work will be between the hours of 6.30 a.m. and 10.00 a.m., and the second not later than 10.00 p.m.

ARTICLE NO. 4.

CALCULATING ASSIGNMENTS AND MEAL PERIODS.

The time for fixing the beginning of assignments or meal period is to be calculated from the time fixed for the crew to begin work as a unit, without regard to preparatory or individual duties.

RULES OF CHICAGO JOINT AGREEMENT.

The following rules of the Chicago Joint Agreement are adopted effective September 1, 1919, and are written into the schedules of Regulations for the government of Yard Enginemen and Firemen and supersede conflicting regulations for the government of Yard Enginemen and Firemen employed on the Washington Terminal Railroad effective January 1, 1919, by order of Director General.

Representation Rule:

The right of any Engineer, Fireman or Hostler to have the regularly constituted Committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the General Committee making the same, is conceded; provided, when a member of either organization has a grievance, which the local Committee of his organization is unable to adjust with the local officers of the Company, the matter shall be handled by the two General Chairmen, who shall work jointly in handling such grievance to its final conclusion.

ARTICLE 10.

(a) Firemen shall rank on the Firemen's roster from the date of their first service as Firemen when called for such service, except as provided in Section (k), and, when qualified, shall be promoted to positions as Engineers in accordance with the following rules:

(b) Firemen shall be examined for promotion according to seniority on the Firemen's roster, and those passing the required examination shall be given certificate of qualification, and, when promoted, shall hold their same relative standing in the service to which assigned.

(c) If for any reason the senior eligible Fireman or Engineer to be hired is not available, and the junior qualified Fireman is promoted

and used in actual service out of his turn, whatever standing the junior Fireman so used establishes, shall go to the credit of the senior eligible Fireman or Engineer to be hired, provided the Engineer to be hired is available and qualifies within thirty days. As soon as the senior Fireman or Engineer to be hired is available, as provided herein, he shall displace the junior Fireman, who shall drop back into whatever place he would have held had the senior Fireman to be promoted or Engineer to be hired been available and the junior Fireman not used.

Note: Qualification, as referred to herein, is not intended to include learning of road or signals.

(d) As soon as a Fireman is promoted, he will be notified in writing by the proper official of the Company of the date of his promotion, and unless he files a written protest within sixty days against such date, he can not thereafter have it changed. When a date of promotion has been established in accordance with regulations, such date shall be posted, and if not challenged in writing within sixty days after such posting, no protest against such date shall afterwards be heard.

(e) No Fireman shall be deprived of his rights to examination, nor to promotion in accordance with his relative standing on the Fireman's roster because of any failure to take his examination by reason of the requirements of the Company's service, by sickness, or by other proper leave of absence; provided, that upon his return he shall be immediately called and required to take examination and accept proper assignment.

(f) The posting of notice of seniority rank, as per Section (d) shall be done within ten days following date of promotion, and such notice shall be posted on every bulletin board of the seniority district on which the man holds rank.

(g) Firemen having successfully passed qualifying examination shall be eligible as Engineers. Promotion and the establishment of a date of seniority as Engineer, as provided herein, shall date from the first service as Engineer when called for such service, provided there are no demoted Engineers back firing. No demoted Engineer will be permitted to hold a run as Fireman on any seniority district while a junior Engineer is working on the Engineers' extra list, or holding a regular assignment as Engineer on such seniority district.

Note: On roads where promotion is to road service only, promotion and establishment of seniority date as road Engineer will obtain.

(h) On a seniority district where Firemen are required to fire less than three years, all Engineers will be hired:

If required to fire three and less than four years, one promoted and one hired:

If required to fire four and less than five years, two promoted and one hired:

If required to fire five and less than six years, three promoted to one hired:

If required to fire six and less than seven years, four promoted to one hired:

If required to fire seven and less than eight years, five promoted to one hired:

On seniority districts where Firemen are required to fire eight years or more, all Engineers will be promoted.

The foregoing will not prevent Committees from having discharged Engineers re-employed or reinstated on their former seniority districts at any time.

(i) If the Engineer to be hired is not available, when needed, and the senior qualified Fireman is promoted, the date of seniority thus established shall fix the standing of the hired Engineer, who, if available and qualified within thirty days from date senior qualified Fireman is promoted, will rank immediately ahead of the promoted Fire-

man. The promoted Fireman will retain his date of seniority as Engineer and will be counted in proportion of promotions.

(j) In case an Engineer is hired and used in actual service, when, under requirements of Section (h), a Fireman (or Firemen) should have been promoted, the date of seniority thus established shall fix the standing of the senior qualified Fireman (or Firemen) due to be promoted, provided he or they are eligible and qualify within thirty days, who shall rank immediately ahead of the hired Engineer on the Engineers' seniority list. The hired Engineer will retain his date of seniority, and be counted in proportion of Engineers to be hired.

(k) The seniority date of the hired Engineer shall be the date of his first service as Engineer, except as provided in Sections (c), (i) and (j) of this Article. It is further provided that Engineers hired, or permanently transferred from one seniority district to another on any railroad, shall be given a date of seniority as Fireman corresponding with their date as Engineer.

ARTICLE 11.

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(a) When, from any cause, it becomes necessary to reduce the number of Engineers on the Engineers' working lists on any seniority district, those taken off may, if they so elect, displace any Fireman their junior on that seniority district under the following conditions:

1st.—That no reduction will be made so long as those in assigned or extra passenger service are earning the equivalent of 4,000 miles per month; in assigned, pooled or chain-gang freight, or other service paying freight rates, are averaging the equivalent of 3,200 miles per month; on the road extra list are averaging the equivalent of 2,600 miles per month, or those on the extra list in switching service are averaging 26 days per month.

2d.—That when reductions are made they shall be in reverse order of seniority.

(b) When hired Engineers are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty days from the date their services are required. This rule also applies to Firemen.

(c) Engineers taken off under this rule shall be returned to service as Engineers in the order of their seniority as Engineers, and as soon as it can be shown that Engineers in assigned or extra passenger service can earn the equivalent of 4,800 miles per month; in assigned—pooled—chain-gang or other regular service paying freight rates—the equivalent of 3,800 miles per month—or in extra service the equivalent of 3,000 miles per month.

(d) In the regulation of passenger or other assigned service, sufficient men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles for passenger service, and 3,200 and 3,800 miles for other regular service, as provided herein. If, in any service, additional assignments would reduce earnings below these limits, regulations will be effected by requiring the regular assigned man or men to lay off when the equivalent of 4,800 miles in passenger or 3,800 miles in other regular service has been reached.

(e) Under this rule, it is understood that after all Engineers who have been taken off have been returned to service as Engineers, this rule shall not apply with respect to further additions.

Note: In making reductions and replacing Firemen upon the service list, the same mileage shall apply as in the case of Engineers.

ARTICLE 25.

Duration of Schedule.

This Schedule will not be changed, abrogated or annulled by either party to it, without giving thirty days advance written notice to the other party, setting forth intentions or desires to effect the same.

(Signed)

For the Washington Terminal Railroad,
J. L. Wilkes,
Superintendent.

For the Brotherhood of Locomotive Engineers,
Darius Harman,
General Chairman.

For the Brotherhood of Locomotive Firemen and Enginemen,
H. B. Bowersox,
General Chairman.

For the Brotherhood of Railroad Trainmen,
Wm. Abbott,
General Chairman.

Approved:
J. B. Warrington,
Terminal Manager.

EXHIBIT D.

THE WASHINGTON TERMINAL COMPANY

SCHEDULE OF RULES AND RATES OF PAY FOR ENGINEMEN AND FIREMEN

(In the Operation of Trains or Engines Propelled by Steam or Other Motive Power)

Effective February 1, 1923

(except as otherwise specified)

ARTICLE 1.

Rates of Pay.

Enginemen (Effective August 1, 1927.)

Weight on Drivers	Rate per Day	Hourly Rate Regular	Hourly Rate Overtime
Less than 140,000 pounds	$7.22	$ .9025	$1.355
140,000 to 200,000 pounds	7.40	.925	1.3875
200,000 to 300,000 pounds	7.57	.9475	1.4225
300,000 pounds and over	7.74	.9675	1.4525
Mallets under 275,000 pounds	8.39	1.05	1.575
Mallets 275,000 pounds and over	8.64	1.08	1.62

Firemen and Helpers (Electric) (Effective February 1, 1927)

	Firemen			Helpers (Electric)		
Weight on Drivers	Rate per day	Hourly Regular	Rate Overtime	Rate per day	Hourly Regular	Rate Overtime
Less than 140,000 pounds ..	$5.68	$.71	$1.065	$5.68	$.71	$1.065
140,000 to 200,000 pounds ..	5.81	.7275	1.09	5.68	.71	1.065
200,000 to 300,000 pounds ..	5.93	.7425	1.1125	5.68	.71	1.065
300,000 pounds and over ...	6.11	.765	1.1475	5.85	.7325	1.0975
Mallets:						
Under 275,000 pounds	6.88	.86	1.29			
275,000 pounds and over ...	7.14	.8925	1.34			

HOSTLERS (Effective February 1, 1927)

	Rate per Day	Hourly Rate Regular	Overtime
Outside	$6.36	$.795	$1.1925
Inside	5.68	.71	1.065
Hostler Helpers	5.07	.635	.9525

ARTICLE 2.

BASIC DAY.

Eight hours or less shall constitute a day's work.

ARTICLE 3.

OVERTIME.

Except when changing off, where it is the practice to work alternately days and nights for certain periods; working through two shifts to change off; or where exercising seniority rights from one assignment to another; or when extra men are required to be used by schedule rules—any rules to the contrary to be changed accordingly—all time worked in excess of eight hours continuous service in a twenty-four hour period shall be paid for as overtime on the minute basis at one and one-half times the hourly rate. Extra Enginemen and Firemen will not be paid time and one-half unless service is continuous.

Example.

What compensation should be allowed for additional service where a crew is regularly assigned to work 12.00 midnight to 8.00 a. m. and (service performed not affected by exceptions outlined in this rule):

Question. (a) Is required to cover the third shift on the same day 4.00 p. m. to 12.00 midnight?

Answer. (a) Eight hours at time and one-half.

Question. (b) Is required in an emergency to work 8.30 a. m. until 11.30 a. m.?

Answer. (b) Eight hours at time and one-half.

Question. (c) Is required in an emergency to work 8.00 p. m. to 12.00 midnight (four hours) on the same day?

Answer. (c) Eight hours at time and one-half.

Question. (d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11.00 p. m. and being relieved at 7.00 a. m., and consequently in the 24-hour period worked nine hours, but not more than eight hours on a shift?

Answer. (d) On account of complying with the 48-hour provision, which makes it permissible to change beginning time, crews only entitled to a minimum day.

ARTICLE 4.

ASSIGNMENTS.

Enginemen and Firemen shall be assigned for a fixed period of time. So far as it is practicable, assignments shall be restricted to eight hours' work.

Enginemen assigned to regular yard work will be assigned to regular engines if practicable.

ARTICLE 5.

STARTING TIME.

(a) Regularly assigned yard crews shall each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours' advance notice.

(b) Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between the hours of 6.30 a. m. and 8.00 a. m.; the second, 2.30 p. m. and 4.00 p. m.; and the third, 10.30 p. m. and 12.00 midnight.

(c) Where two shifts are worked in continuous service, the first shift may be started during any one of the periods named in Section (b).

(d) Where two shifts are worked not in continuous service, the time for the first shift to begin work will be between the hours of 6.30 a. m. and 10.00 a. m., and the second not later than 10.30 p. m.

(e) Where an independent assignment is worked regularly, the starting time will be during one of the periods provided in Sections (b) or (d).

ARTICLE 6.

Calculating Assignment and Meal Periods.

The time for fixing the beginning of assignments or meal periods is to be calculated from the time fixed for the crew to begin work as a unit, without regard to preparatory or individual duties.

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ARTICLE 7.

Lunch Time.

(a) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work, without deduction in pay.

(b) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

(c) An individual engineman, fireman or hostler working through two shifts is to have one meal period with each. (Effective March 16, 1924.)

ARTICLE 8.

Seniority.

(a) Ability, fitness, and seniority entitle Enginemen and Firemen to promotion as opportunity may offer. Enginemen and Firemen passed around for promotion will, if they so desire, be informed upon request to the Superintendent, the reason for the same.

(b) Firemen eligible to promotion to Enginemen will be given three examinations. Failing to pass the first examination, they will be allowed thirty days to prepare themselves for a second examination and failing to pass the second examination will be allowed an additional thirty days to further prepare themselves. If they successfully pass the second or third examination, they will hold seniority over any junior Firemen who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination, the Firemen so doing will be dropped to the senior extra Firemen and can only come up again in his turn. This shall not be retroactive. Firemen entitled to promotion, who are injured or unable to take the examination by reason of sickness, suspension or leave of absence, shall not lose their turn thereby.

(c) Enginemen and Firemen transferred from the P. B. & W. R. R. and the B. & O. R. R. to the Washington Terminal Company will be given seniority as shown on the official roster of Enginemen dated February 1, 1912, and Firemen dated May 1, 1911.

(d) A classified roster will be posted adjacent to the Crew Board and at the Engine House, giving dates Enginemen and Firemen entered service, also the date of their promotion. Men so promoted will retain their seniority. The classified roster will be revised every six months.

(e) In reduction of force and rearrangement of crews consequent thereto, seniority of Enginemen and Firemen shall govern. Enginemen and Firemen relieved from service through reduction in force, will be given preference in re-employment without loss of seniority providing they return to service within 30 days from time required. (Effective October 25, 1927.)

(f) Enginemen and firemen dismissed from service will lose their seniority unless reinstated within six months from date of dismissal; Enginemen and Firemen leaving the service of their own accord lose their seniority.

(g) All extra Enginemen and Firemen will be worked first in first out, but they will be marked up on the list in the manner in which they came off unless overtime is made. In emergencies, Extra Enginemen and Firemen may be used out of turn provided they are placed back on the board in such a manner as to avoid the loss or gain of a turn to any extra man on extra list. Extra Enginemen will be regularly assigned as Firemen and the number of such will not exceed five on each trick of duty. The senior promoted Fireman on each trick should be used to fill vacancies on that trick after the above five assigned extra Enginemen are used.

(h) When the requirements of the service will permit, enginemen, firemen and hostlers, on request, may be granted leave of absence for a limited time with privilege of renewal. An employee absent on leave, who engages in other employment without the special approval of his superior officer, automatically severs his relation with the Company. (Effective March 16, 1924.)

ARTICLE 9.

Advertising.

(a) New assignments, permanent vacancies and the working hours of any assignment permanently changed, will be advertised on the Bulletin Board for three days and at the expiration of that time will be given to the senior Engineman or Fireman in the service making application in writing. Enginemen or Firemen making application for a new assignment or vacancy must file the same with the officer signing the advertisement, and will receive from him an acknowledgment thereof.

(b) Vacancies caused by sickness, injury or absence from duty will be known as temporary vacancies. Such vacancies will, at the expiration of five days, be advertised upon the Bulletin Board for a period of three days, and at the expiration of that time will be given to the senior Engineman or Fireman in service making application therefor. Temporary vacancies created by the advertisement as above will be likewise advertised starting on the first day the vacancy is created in each case and filled in like manner and so on until all vacancies are filled.

(c) Enginemen or Firemen failing to make application in writing for a new assignment or vacancy precludes promotion to that assignment or vacancy. An Engineman or Fireman cannot make application for an assignment that he has just vacated, but if the assignment is vacated by the man who fills his vacancy, his application will then be considered. Enginemen demoted to Firemen will be given assignments to which their seniority as Firemen entitle them.

(d) When working hours of any assignment are changed causing the assignment to be advertised, the Engineman or Fireman holding the assignment prior to the advertisement will be permitted to hold assignment during the same. When Enginemen or Firemen are absent for any cause when vacancies are advertised, they will be permitted to make application for vacancies occurring during their absence, provided they do so within three days after returning to work.

(e) When two or more engines of different weight are used during the tour of duty in any class of service the highest rate applicable to any engine used shall be paid for the entire trick of duty. (Effective October 25, 1927.)

ARTICLE 10

Discipline.

(a) Enginemen, firemen and hostlers will not be suspended or dismissed from the service without a fair and impartial trial; neither will they be held off duty for minor offenses pending investigation or decision. If found not guilty of charges, enginemen, firemen and hostlers shall be reinstated and paid for all time lost. Witnesses will be examined separately, but in the event of conflicting testimony, those whose evidence conflicts will be examined together. Enginemen, firemen and hostlers will be notified in writing five days prior to date suspension takes effect. (Effective March 16, 1924.)

(b) Time lost attending investigations will be applied against suspension and notice of discipline will be worded accordingly. Time lost as a result of appeals from discipline will not be applied against suspension.

(c) An Engineman, Fireman or Hostler required to attend investigation may be accompanied by an employee of his own selection, who will be permitted to question witnesses so far as the interest of the Engineman, Fireman or Hostler is concerned.

(d) When letters of suspension or censure are given Enginemen, Firemen and Hostlers, they will be permitted to retain same.

(e) Enginemen, Firemen and Hostlers attending court or inquest under instructions from the Railroad, will be allowed compensation for the same with a minimum of one day; if court or inquest is held away from their home, they will be allowed traveling expenses and board in addition.

(f) An Engineman, Fireman or Hostler who considers that an injustice has been done him, and who has appealed his case in writing to the Superintendent within five days, will be given a hearing at which he may be accompanied by an employee of either of the above classes to assist him in presenting his case. (Effective October 25, 1927.)

(g) An Engineman, Fireman or Hostler may have the regularly constituted committee of his organization represent him in the handling of his grievances, under the interpretation placed upon the schedule involved; provided, when a member of either organization has a grievance, which the local committee of his organization is unable to adjust, the matter may be further handled by the two general chairmen working jointly.

ARTICLE 11.

Time.

(a) Time of Enginemen and Firemen will begin when they are required to report for duty and continue until they are relieved from duty. They will report for duty and be relieved from duty at specified points; when not so relieved and while waiting at specified points they will be considered on duty.

(b) Extra Enginemen or Firemen called and released without performing service will be paid one-half of a minimum day and stand first out; if held over four hours they will be paid a minimum day and will be placed at the foot of the board.

(c) Enginemen and Firemen required, for the purpose of preparing engine, to report in advance of time fixed for crew to begin work as a unit, will receive actual time with not less than thirty minutes at regular hourly rate, according to weight of engine on drivers, in addition to regular day's pay. Enginemen when arriving on Inspection Pit after completion of assignment will be allowed ten minutes pro-rata pay for inspecting engine and making our report.

(d) Enginemen and Firemen will not be required to report more than four hours in advance of going on duty, after having been absent.

(e) Enginemen, Firemen and Hostlers required to attend investi-

gations will be given an audience promptly and when not at fault will be paid at regular rates on a minute basis for time held after relieved from duty.

(f) Firemen performing more than one class of service in a tour of duty, will be paid for the entire service at the highest rate applicable to any class of service performed, with a minimum of one day for the combined service. The overtime basis for the rate paid will apply for the entire tour of duty. (Effective May 1, 1923.)

ARTICLE 12.

Engine Equipment.

(a) A squirt hose will be maintained on all yard engines at all times; water coolers will be placed on all engines in yard service and ice will be furnished from April 1st to October 1st. Awnings will be placed upon all engines in yard service and substantial arrangements shall be attached to all engines to afford the Engineman and Fireman protection against inclement weather.

(b) Enginemen and Firemen will not be required to work with engines that blow steam to such an extent that the vision of signals is obscured.

ARTICLE 13.

Special Duty.

Enginemen and Firemen will be considered in connection with special duty pertaining to locomotives.

EMPLOYEES COVERED BY THIS SCHEDULE.

ARTICLE 14.

Definition and Duties.

An Outside Hostler is a Hostler who handles engines between the passenger station and the engine-house or yards or on main tracks; and should have at least 18 months' seniority as a Fireman on the official roster for Firemen; an Inside Hostler is a Hostler who handles engines in and about the enginehouse within the confines of the engine terminal; the term "Hostlers' Helper" applies to employees used to assist outside Hostlers.

ARTICLE 15.

Pilots.

Enginemen or Firemen used as Pilots will be allowed Enginemen's pay.

ARTICLE 16.

Outside Service.

(a) Enginemen, Firemen or Hostlers required to perform work outside of their regularly assigned duties, will be paid their regular rates except when filling positions that pay a higher rate, when they will receive the higher rate.

(b) In filling positions that can be taken by disqualified or permanently disabled Enginemen or Firemen, consideration will be given to such employees as are capable of performing the service.

ARTICLE 17.

Coupling Hose, Etc.

Firemen will not be required to cut hose, couple up or cut off engines or throw switches but they will do so in emergency.

ARTICLE 18.

Restrictions.

(a) Grease cups will be filled and screwed down when engines are put out for service. Enginemen will give any necessary attention while engines are in their charge and report any attention so given.

(b) Firemen will be relieved of cleaning engines; neither will they be required to clean fires. Lubricators will be filled, markers and other lamps cared for, including filling, but not lighting, and all supplies placed on engines at points where roundhouse or shop forces are maintained. The Firemen shall not, however, be relieved of the responsibility of knowing whether the engines for which they are called, are properly equipped.

ARTICLE 19.

Service Letter.

Enginemen and Firemen who have been in the Company's service for six months, will, if they so desire, be given a service letter signed by the Superintendent, when leaving the employment of the Company, which they must sign when presented. This letter will indicate the different services performed during employment.

ARTICLE 20.

Time Not Allowed.

When time claimed is not allowed, Enginemen and Firemen will be notified in writing and the reasons given therefor.

ARTICLE 21.

Rest Periods.

Rest period will be regulated in accordance with the Federal Statute known as the "Sixteen Hour Law." Enginemen and Firemen who are relieved for rest in compliance with this law, shall be allowed to resume work when the lawful rest period is up and to work eight hours or be paid therefor.

ARTICLE 22.

Duration of Schedule.

Should either the Management or the Enginemen and Firemen desire to change any or all these regulations, the party desiring to make the change shall notify the other party in writing of the desired change; and no change will be made, except by mutual consent, until thirty days after such notice has been given.

FOR THE WASHINGTON TERMINAL COMPANY:

J. H. Tonge,
Superintendent.

FOR THE EMPLOYEES:

Darius Harman,
General Chairman.
Brotherhood of Locomotive Engineers.

Paul B. Cornwell,
General Chairman.
Brotherhood of Locomotive Firemen & Enginemen.

EXHIBIT E.

CIRCULAR NO. 1

(ISSUED OCTOBER 10, 1934)

NATIONAL RAILROAD ADJUSTMENT BOARD

ORGANIZATION AND CERTAIN RULES OF PROCEDURE

Headquarters, Chicago, Illinois

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

ORGANIZATION

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of ten Members, and the Fourth Division thereof is composed of six Members.

CLASSES OF DISPUTES

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act approved June 21, 1934.

Jurisdiction

First Division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions.

Form of Submission

Parties: All parties to the dispute must be stated in each submission.

Statement of Claim: Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired.

Statement of Facts: In a "Joint Statement of Facts," if possible, briefly, but fully set forth the controlling facts involved. In event of inability to agree upon a "Joint Statement of Facts," then each party shall show separately the facts as they respectively believe them to be.

Position of Employees: Under this caption the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

Position of Carrier: Under this caption the carrier must properly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

Signatures: All submissions must be signed by the parties submitting the same.

Ex Parte Submission: In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (thirty days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

GENERAL

To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

HEARINGS

Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

APPEARANCES

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

AWARDS

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

"NATIONAL RAILROAD ADJUSTMENT BOARD,

By Order of ..... Division

ATTEST: .....
Secretary."

By order of

NATIONAL RAILROAD ADJUSTMENT BOARD,

MACY NICHOLSON, *Chairman,*
D. W. HELT, *Vice-Chairman.*

RESOLUTION ADOPTED JUNE 18, 1935*

"It is agreed by the members of the First Division that in handling of Ex Parte submissions, from this date, *June 18, 1935, until January 1, 1936,* the following method will be adopted as a matter of trial and without change in the present rule of handling of Ex Parte submissions, except as follows:

When the submissions of both parties to this dispute have been received by the Secretary of the First Division, he will immediately furnish each of the parties to the dispute with the submission of the other party, in order that they may be properly prepared to answer all phases of the dispute when hearing is held.

This arrangement to be used for the guidance of the First Division and to remain in that body and *cease on January 1, 1936,* unless extended by the majority vote of the First Division."

QUOTATION FROM THE MINUTES OF APRIL 27, 1937, SHOWING FURTHER ACTION TAKEN THEREON*

"Resolved that the resolution adopted on June 18, 1935, with respect to ex parte submissions regarding the mailing of the employees' submission to the management, and of the management's submission to the committees, be and the same is hereby continued in effect until July 1, 1938, on which date the arrangement terminates unless extended by a majority vote of the full membership of the First Division; and that the secretary of the Division incorporate in each such letter of transmittal the following specific language:

'This case is assumed to be complete and nothing will be added thereto prior to the date of hearing thereon. It should be understood, however, that any argument presented to the Division at the hearing will be confined to matters incorporated in the submissions, and introduction of evidence at the hearing is foreclosed.

If argument is prepared in form of written brief, copies thereof shall be exchanged between the parties prior to the date of hearing.

At the direction of the Division I am sending to the management a copy of the employees' submission, and to the general chairman a copy of the management's submission. This is being done in order that both parties may have an opportunity to study the submissions prior to the date set for hearing.' "

* The above rules have been continued in effect by the First Division of the National Railroad Adjustment Board and are still effective.

EXHIBIT F.

Award No. 3115
Docket No. 5059

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

The First Division consisted of the regular members and in addition Referee John A. Lapp when award was rendered.

Parties to Dispute:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

BROTHERHOOD OF RAILROAD TRAINMEN

THE WASHINGTON TERMINAL COMPANY

STATEMENT OF CLAIM: It is the practice of the Washington Terminal Company to require tenant line road engines, manned by tenant line road engine crews, to move dead equipment from the depot to the coach yards, move dead equipment from the coach yards to the depot, and perform other switching service on tracks of the Washington Terminal. Road engine crews of the Southern Railway, the Chesapeake & Ohio, and the Richmond, Fredericksburg & Potomac, all tenant lines, have been required to remain on their engines and turn their trains before delivering to the coach yards. Train and enginemen of the Washington Terminal Company claim that all such work should be performed by men holding seniority exclusively on the rails of the Terminal Company.

EMPLOYES' STATEMENT OF FACTS: February 3rd, 1903, an Act of Congress was approved to provide for a Union Railroad Station in the District of Columbia. Certain portions of this legislation refer to an Act of Congress approved February 12th, 1901, entitled, "An Act to provide for eliminating certain grade crossings of railroads in the District of Columbia, to require and authorize the construction of new terminals and tracks for the Baltimore & Ohio Railroad Company in the City of Washington, and for other purposes." Section 3 of the Act of 1903 provides that the said Terminal Company is also expressly authorized and empowered, subject to the approval of the Commissioners of the District of Columbia, to acquire and become possessed of such lands in the District of Columbia, outside the City limits, as may be from time to time needed for the purpose, and thereon to construct, maintain, own, and operate yard tracks, switches, roundhouses, shops, and other structures to adequately accomodate the handling, shifting, housing, storing, cleaning, and repairing of the locomotives and cars of such companies as shall be entitled to use the said passenger station and terminal; and also to establish, maintain and operate the necessary tracks connecting the same with the tracks on Delaware Avenue; provided, that said roundhouses and shops shall be located as designated on plans to be approved by the Commissioners of the District of Columbia, and filed in the office of the Engineer Commissioner.

As a result of this legislation, the Baltimore & Ohio and the Pennsylvania Railroad instituted plans for the building of a Union Passenger Station in the City of Washington. Upon the opening of the Washington Terminal Company in 1907, the employes necessary for all branches of its operation were taken from the Baltimore & Ohio Railroad, the Pennsylvania Railroad and the Southern Railway, retaining their seniority rights with their respective railroads.

On February 10th, 1908, Superintendent G. W. Martin of the Washington Terminal Company issued General Notice No. 27, reading as follows:

"In order that permanent switching crews may be organized, it is desired that all conductors, brakemen, enginemen and firemen, who were transferred from the P. B. & W. Railroad, B. & O. Railroad and Southern Railway, and are now in the service of the Terminal Company, signify their intention of remaining with the Terminal Company. The seniority rating held with their respective companies prior to the transfer will hold with the Terminal Company.

"Those desiring to remain will forward applications to this office by or before February 20th.

"It is expected that the requirements will be twelve day crews and eleven night crews.

"The Terminal is perfecting plans for a relief department, which, if adopted, will include the various features that now prevail in the relief departments of the P. B & W. Railroad and B. & O. Railroad, and transferred employees will bring with them such credits as they may now hold with their respective companies. However, until this department is organized, the men who have been transferred and who are members, will be cared for by the relief departments of their respective companies the same as heretofore."

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On or before the date set those who wished to remain as employes of the Washington Terminal Company signified their desire to do so and relinquished the rights they held on the railroad from which they transferred, and negotiated agreements with the management of the Washington Terminal Company, which have remained in effect, except as revised from time to time by agreement between the Management and the Employes.

The limits of the Washington Terminal as described on Page 4 of the book of rules of that company are as follows:

"Washington Terminal—Comprises Union Station, the tracks from Union Station extending northward to Division Boards located at junction with P. R. R. and Washington Branch of B. & O. R. R., 467 feet north of center line of New York Avenue overhead bridge; at junction with Metropolitan Branch of B. & O. R. R., 395 feet north of center line of New York Avenue overhead bridge, southward to the Division Board located at junction with P. R. R., 1,584 feet south of South Portal of First Street Tunnel; Eckington Coach Yard; and Ivy City Engine and Shop Yard."

Article 8 of the current Schedule of Rules and Rates of Pay for Conductors, Brakemen, Back-Up Men, Pilots and Switchtenders reads as follows:

"Seniority. (a) Ability, fitness and seniority entitle Yardmen to promotion as opportunity may offer. Yardmen passed around for promotion, will, if they so desire, be informed upon request to the Superintendent, the reason for the same.

(b) The order of promotion for Yardmen will be from senior extra Brakeman; senior regular promoted Brakeman to exta Conductor; senior extra Conductor to regular Conductor. Failure to make application for a promotion or the refusal of promotion by Yardmen holding seniority rights to entitle them to such promotion, places them behind

the last regular Yardman holding a regular assignment. Yardmen desiring to be demoted of their own accord will return to the foot of the extra Brakeman's list, unless incapacitated by sickness or injury, request to be made in writing.

(c) Yardmen eligible to promotion to Conductors will be given three examinations. Failing to pass the first examination, they will be allowed thirty days to prepare themselves for a second examination, and failing to pass the second examination will be allowed an additional thirty days to further prepare themselves. If they successfully pass the second or third examination, they will hold seniority over any junior Yardmen, who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination, the Yardmen so doing will be placed behind the last Yardman holding a regular assignment. This shall not be retroactive. Yardmen entitled to promotion, who are injured or unable to take the examination by reason of sickness, suspension or leave of absence, shall not lose their turn thereby.

(d) Yardmen transferred from the P. B. & W. R. R., the B. of O. R. R., and the Southern Railway to the Washington Terminal Company will be given seniority as shown on the official roster of Yardmen dated April 1, 1911.

(e) A classified roster will be posted adjacent to the Crew Board, giving dates Yardmen entered service, also the date of their promotion. Men so promoted will retain their seniority. The classified roster will be revised every six months.

(f) When additional Conductors are needed, a list of the senior eligible Brakemen will be posted ten days prior to the examination.

(g) The senior promoted Brakeman on crews will be eligible to take charge of crews, when the regular Conductor is absent.

(h) In reduction of force and rearrangement of crews consequent thereto, seniority of Yardmen shall govern. Yardmen relieved from service through reduction in force, will be given preference in reemployment without loss of seniority providing they return to service within 30 days from time required. (Effective May 1, 1928.)

(i) Yardmen absent without leave, will at the expiration of five days, be considered as having left the service unless application is made to the proper officer within that period.

(k) Yardmen dismissed from service will lose their seniority unless reinstated within six months from date of discharge; Yardmen leaving the service of their own accord, lose their seniority.

(l) All extra Yardmen will be worked first in, first out.

(m) Switchtender will have no seniority as Conductors or Brakemen; Conductors and Brakemen will have no seniority as Switchtenders.

(n) When the requirements of the service will permit, employes, on request, may be granted leave of absence for a limited time with privilege of renewal. An employee absent on leave, who engages in other employment without the special approval of his superior officer, automatically severs his relation with the Company."

Article 9 of the same schedule reads as follows:

"Advertising. (a) New assignments, permanent vacancies and the working hours of any assignment permanently changed, will be advertised on the Bulletin Board for three days and at the expiration of that time will be given to the senior Yardman in the service making application in writing. Yardmen making application for a new assignment or vacancy must file the same with the officer signing the advertisement and will receive from him an acknowledgment thereof.

(b) Vacancies caused by sickness, injury or absence from duty will be known as temporary vacancies. Such vacancies will, at the ex-

piration of five days, be advertised upon the Bulletin Board for a period of three days and at the expiration of that time will be given to the senior Yardman in service making application therefor. Temporary vacancies created by the advertisement as above, will be likewise advertised starting on the first day the vacancy is created in each case and filled in like manner, and so on until all vacancies are filled.

(c) Yardmen failing to make application in writing for a new assignment or vacancy precludes promotion to that assignment or vacancy. A Yardman cannot make application for an assignment that he has just vacated, but if the assignment is vacated by the man who fills his vacancy, his application will then be considered.

(d) When working hours of any assignment are changed causing the assignment to be advertised, the Yardman holding the assignment prior to the advertisement will be permitted to hold assignment during the same. When Yardmen are absent for any cause when vacancies are advertised, they will be permitted to make application for vacancies occurring during their absence, provided they do so within three days after returning to work."

Articles 8 and 9 of the current Schedule of Rules and Rates of Pay for Enginemen and Firemen, read as follows:

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"ARTICLE 8.

"Seniority. (a) Ability, fitness and seniority entitle Enginemen and Firemen to promotion as opportunity may offer. Enginemen and Firemen passed around for promotion will, if they so desire, be informed upon request to the Superintendent, the reason for the same.

(b) Firemen eligible to promotion to Enginemen will be given three examinations. Failing to pass the first examination, they will be allowed thirty days to prepare themselves for a second examination and failing to pass the second examination will be allowed an additional thirty days to further prepare themselves. If they successfully pass the second or third examination, they will hold seniority over any junior Firemen who may have been promoted in the meantime. Failing to pass the third examination or if they decline examination, the Firemen so doing will be dropped to the senior extra Firemen and can only come up again in his turn. This shall not be retroactive. Firemen entitled to promotion, who are injured or unable to take the examination by reason of sickness, suspension or leave of absence, shall not lose their turn thereby.

(c) Enginemen and Firemen transferred from the P. B. & W. R. R., and the B. & O. R. R. to the Washington Terminal Company will be given seniority as shown on the official roster of Enginemen dated February 1, 1912, and Firemen dated May 1, 1911.

(d) A classified roster will be posted adjacent to the Crew Board and at the Engine House, giving dates Enginemen and Firemen entered service, also the date of their promotion. Men so promoted will retain their seniority. The classified roster will be revised every six months.

(e) In reduction of force and rearrangement of crews consequent thereto, seniority of Enginemen and Firemen shall govern. Enginemen and Firemen relieved from service through reduction in force, will be given preference in re-employment without loss of seniority provided they return to service within 30 days from time required. (Effective Oct. 25, 1927.)

(f) Enginemen and Firemen dismissed from service will lose their seniority unless reinstated within six months from date of dismissal; Enginemen and Firemen leaving the service of their own accord lose their seniority.

(g) All extra Enginemen and Firemen will be worked first in, first out, but they will be marked upon the list in the manner in which

they came off unless overtime is made. In emergencies, extra Enginemen and Firemen may be used out of turn provided they are placed back on the board in such a manner as to avoid the loss or gain of a turn to any extra man on extra list. Extra Enginemen will be regularly assigned as Firemen and the number of such will not exceed five on each trick of duty. The senior promoted Firemen on each trick should be used to fill vacancies on that trick after the above five assigned extra Engineme. are used.

(h) When the requirements of the service will permit, enginemen, firemen and hostlers, on request, may be granted leave of absence for a limited time with privilege of renewal. An employe absent on leave who engages in other employment without the special approval of his superior officer, automatically severs his relation with the Company. (Effective March 16, 1924.)

"ARTICLE 9.

"Advertising. (a) New assignments, permanent vacancies and the working hours of any assignment permanently changed, will be advertised on the Bulletin Board for three days and at the expiration of that time will be given to the senior Engineman or Fireman in the service making application in writing. Enginemen or Firemen making application for a new assignment or vacancy must file the same with the officer signing the advertisement, and will receive from him an acknowledgment thereof.

(b) Vacancies caused by sickness, injury or absence from duty will be known as temporary vacancies. Such vacancies will, at the expiration of five days, be advertised upon the Bulletin Board for a period of three days, and at the expiration of that time will be given to the senior Enginemen or Fireman in service making application therefor. Temporary vacancies created by the advertisement as above will be likewise advertised starting on the first day the vacancy is created in each case and filled in like manner and so on until all vacancies are filled.

(c) Enginemen or Fireman failing to make application in writing for a new assignment or vacancy precludes promotion to that assignment or vacancy. An Engineman or Fireman cannot make application for an assignment that he has just vacated, but if the assignment is vacated by the man who fills his vacancy, his application will then be considered. Enginemen demoted to Firemen will be given assignments to which their seniority as Firemen entitles them.

(d) When working hours of any assignment are changed causing the assignment to be advertised, the Engineman or Fireman holding the assignment prior to the advertisement will be permitted to hold assignment during the same. When Enginemen or Fireman are absent for any cause when vacancies are advertised, they will be permitted to make application for vacancies occurring during their absence, provided they do so within three days after returning to work.

(e) When two or more engines of different weight are used during the tour of duty in any class of service the highest rate applicable to any engine used shall be paid for the entire trick of duty. (Effective October 25, 1927.)"

This complaint as set forth under "Statement of Claim" has been in existence practically ever since the Washington Terminal was opened and repeated conferences have been held with the Management of the Washington Terminal Company by the committees, assisted by officers of their respective organizations, without being successful in satisfactorily disposing of the case. The last of these conferences was held with Mr. C. W. Galloway, Chairman, Board of Managers, Washington Terminal Company, on May 15th, 1937.

POSITION OF EMPLOYES: It is the contention of the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen that the contracts or agreements existing between the Washington Terminal Company and the organizations guarantee the employes covered by such agreements the right to perform the work in dispute, and that tenant line companies because of these agreements on the Washington Terminal have no right to make agreements with their respective employes to perform this service within the Washington Terminal, nor has the Washington Terminal company the right to permit or require these tenant line employes to perform this work within the Washington Terminal.

In support of our position we submit herewith copy of agreement dated July 27th, 1934, covering manning of construction trains within the limits of the Washington Terminal during the electrification work by the Pennsylvania Railroad, signed by the General Chairmen on the various railroads, who met at the request of the railroads that they reach an agreement among themselves regarding the manning of this construction train service. After this agreement was reached it was accepted and recognized by the managements in the settlement of disputes.

An opportunity for oral argument is requested.

Washington, D. C., July 27, 1934

AGREEMENT.

IT IS HEREBY AGREED, That the Washington Terminal crews will man all of the trains used in the construction work on the Washington Terminal rails in connection with the electrification work, and that R. F. & P. crews will man all of the trains used in construction work on the R. F. & P. rails (Potomac Yard) in connection with the electrification work; that P. R. R. crews will man all assigned crews that might be assigned to the so-called trouble trains (wire trains) except such trains as are assigned exclusively to the Washington Terminal or Potomac Yard, such trains to be manned by men holding seniority on the respective railroads.

Manning of construction trains working on two or more of the rails of the Pennsylvania R. R., Washington Terminal Co. or R. F. & P. R. R. will be divided proportionately on a time basis, the basis of time consumed on the respective properties.

(Signed) J. M. MCCORMICK,
W. C. KNOWLES,
H. E. CORE,
W. A. CULP,
General Chairmen, Pennsylvania, R. R.
J. D. HITE,
J. K. WILLIAMSON,
H. M. COUSINS,
General Chairmen, R. F. & P. R. R.
R. E. TYDINGS,
S. W. HANDY,
General Chairmen, Washington Terminal Co.

Reply of the Washington Terminal Company to Ex Parte Submission, Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen versus Washington Terminal Company:

STATEMENT OF CLAIM: "It is the practice of the Washington Terminal Company to require tenant line road engines, manned by tenant line road engine crews, to move dead equipment from the depot to the coach yards, move dead equipment from the coach yards to the depot,

and perform other switching service on tracks of the Washington Terminal. Road engine crews of the Southern Railway, the C. & O., and the R. F. & P., all tenant lines, have been required to remain on their engines and turn their trains before delivering to the coach yards. Train and enginemen of the Washington Terminal Company claim that all such work should be performed by men holding seniority exclusively on the rails of the Terminal Company."

POSITION OF CARRIER: 1. The movements related in the Statement of Claim may be properly grouped as follows:

A—Passenger Road Engine crews moving empty cars from Union Station to the Coach Yards or from the Coach Yards to the Union Station.

B—Inbound Passenger Road Engine crews moving car or cars on head end of certain trains after arrival of train in station and placing same on another track to facilitate movement of train through Terminal.

C—Outbound Passenger Road Engine crews of certain trains taking head end at Washington, couple to cars on adjacent tracks, moving such car or cars to head end of outbound train when backing against such train, completing the train ready for departure.

are recognized operating practices, and protected in their working agreement.

2. All such movements described in each of the above groups are in charge of a Yard Conductor designated and known as Back-up man, who is covered by agreement between the Washington Terminal Company and the representatives of the Brotherhood of Railroad Trainmen, dated April 1, 1924; Article 16 of which agreement reads as follows:

"BACK-UP MEN AND PILOTS

"(a) Back-up men will be paid Conductor's rate and their starting time to begin work will be between the hours of 6:30 A. M. and 8:00 A. M.; 2:30 P. M. and 4:00 P. M.; 10:30 P. M. and 12:00 Midnight, except where the service is curtailed to 16 hours in any 24 hour period, when the first assignment will be between the hours of 6:30 A. M. and 10:00 A. M.; and the second not later than 10:30 P. M.

"(b) Picking up or setting off cars by men in Back-up service will not be considered switching service.

"(c) 48 hours advance notice will be given of changed starting time of regularly assigned Back-up man.

"(d) Pilots will receive Conductor's pay. Their hours of work will be subject to requirements of service."

3. All Terminal movements of passenger road engine crews with cars are in charge of a Yard Conductor (Back-up man) and the provisions of Schedule Rule 16 in effect on the Washington Terminal, so far as the Brotherhood of Railroad Trainmen is concerned, are fully satisfied, protected and fulfilled, and the Brotherhood of Railroad Trainmen, therefore, have no proper claim before the Board. These Enginemen and Firemen are paid for performing such service in accordance with their pay schedules provided for in regulations of their respective employing Railroad Companies. The Railroad Companies render bill to The Washington Terminal Company in reimbursement. Tenant Line road crews move only cars of their own train *and no other cars* and perform no switching in making up and dispatching of trains not permitted under the appropriate Schedule of the Tenant Lines and not supported by Terminal employes' agreement, and it has always been recognized that road crews would be required to handle cars in their own train.

4. These movements are not only clearly permissible under existing regulations and agreements but constitute a practice about as old as Washington Terminal itself, which on November 17th, 1937, was thirty years old, and have been acquiesced in throughout that long period of time.

5. February 4th, 1918, the Committee representing Yard Trainmen on Washington Terminal took up with the Management the practice of Yard Brakemen being used in Back-up service and requested that the service known as Back-up service on Washington Terminal be performed by competent Conductors. The request of the Employes was given due consideration and effective April 1st, 1918, nineteen (19) years ago, it was arranged that Yard Trainmen assigned to Back-up service would be qualified Conductors and paid Conductor's rate and clearly covered by agreement to perform the service herein complained of. Such classification and compensation has continued since April 1st, 1918, and is still in effect.

6. As further evidence of the clear understanding of their acquiescence in and the existence of an agreement in Back-up service, invite attention to Article 16 which was contained in the combined Schedule of Rules and Rates of Pay for Enginemen, Firemen and Yardmen of the Washington Terminal Railroad issued by the United States Railroad Administration, effective December 1st, 1919. That Article provided as follows:

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"PILOTS AND BACK-UP MEN.

"(a) Back-up men will be classified as Conductors and paid Conductors' rate.

"(b) Enginemen or Firemen used as Pilots will be allowed Enginemen's pay; Yardmen used as Pilots will be allowed Conductors' pay."

7. Not only are the movements of the character described made as a matter of right and by force of practice and agreement; the necessity for them has existed for thirty (30) years since the opening of the Terminal in 1907 and because that they were necessary, they were so recognized and provisions made by agreement for compensation. They were and are considered necessary to the proper operation of the Terminal and their continuance through the long period of years has only been interupted to the extent required to meet changed conditions. To do anything different than this generally accepted practice would entail an added burden of increased Terminal time of trains and materially increase movements to such an extent they would prove an interference with orderly movements through interlockings and produce inefficient operation, to the detriment of the service. It would be particularly prohibitive in times of extraordinary occasions such as holiday movements and extraordinary travel incident to the Inaugural celebrations of the President of the United States.

8. These questions have been and are still well understood by the Employes and the Management. Numerous conferences have been had at which this subject was discussed, the Management being impressed with the apparent attitude of the Employes that their objection was not so much to the movements being handled by Back-up men and road engines as to such service being possibly extended to the point where it would be really hurtful to them. Experience, however, has not shown this to be a fact.

9. While more recently the Employes have sought to eliminate these movements regardless of the fact that they have been sanctioned by custom and practice and covered by agreement extending over many years, together with regulations and working agreements, the Management does not consider there is any proper claim. There is not and has not been any violation of agreement and what is being done is by custom, practice and agreement, varying in existence to as much as thirty

(30) years. There is no basis for any dispute in these circumstances and claim should be denied.

10. The Statement of Facts contained in the submission of the Employes in the judgment of the Carrier contains no relevant or useful information as to Statement of Claim which they have set forth. The service undertaken by the Carrier in pursuance of legislative enactment is self-evident. The employment and seniority of Terminal Company by transfer from the B. & O. R. R., P. E. & W. R. R. and Sou. Rwy., (Roads on which formerly employed) has been fully and completely recognized and protected, and there is no basis for any claims or intimations to the contrary. The rules quoted by the Employes with reference to Seniority, Filling of Positions by Advertisements, etc., have not the remotest connection with the claim they have presented beyond one reference, and that has to do with men in Back-up service who perform such service in pursuance of and under the terms of Article 16 of the Agreement and as to these men there is no question as to the strict application of seniority and job assignment regulations. The apparent reason for reference to the Seniority rules and Assignment provisions would seem to be their application to Road Enginemen and Firemen who perform the service in connection with the Back-up men. Such a position is entirely untenable because the Road Enginemen and Firemen are not employed by the Washington Terminal Company and do not perform a switching service, as the movements which they do handle are specifically provided for in the current schedule as *being excluded* from switching movements.

11. From the foregoing it will be apparent and the Management respectfully so submits, that the movements referred to in Statement of Claim of Employes are proper and in no way violate any agreement for the following reasons, in fact, are fully covered and protected by agreements:

(a) By custom and practice have existed about since the Terminal was opened in November, 1907, approximately thirty years.

(b) By reason of such practice throughout such a long period of time have been clearly acquiesced in by the interested employes.

(c) That such acquiescence has not only been amply demonstrated in practice but ratified in working agreements including the current regulations.

(d) That Service performed by Back-up men in accordance with Schedule provision is in conformity with current schedule and carries with it compensation provided for same and is maintained with strict compliance to seniority and assignment rules. If the request of these employes in this case were sustained it would nullify the Back-up Rule in the Washington Terminal Agreement with its Trainmen (Article 16) herein quoted and unjustifiably disregard and abandon practice and custom acquiesced in for approximately 30 years.

(e) Setting off and picking up cars under present schedule is definitely defined as not being considered switching and said movements are in charge of a Back-up man handled by road engine manned by Road Engineman and Fireman, whose use together with service of Back-up man constitutes what is known now and as always, as Back-up service. That the movements handled by road engines in charge of Back-up man are associated with and a part of the individual train of the Engineman and Fireman handling such movements and that for such service performed they are compensated in accordance with provisions of current schedules with their respective Railroad employing companies.

These movements are, therefore, not subject to the objection set forth by the Employes. In other words, these movements are made in pursuance of long established custom and practice acquiesced in by the in-

terested employes under agreement properly negotiated and are clearly permissible under current existing schedule. This is only another way of stating that there is involved only a proper exercise of the rights of the Management and men employed in making the movements referred to.

12. At a conference held on December 2nd, 1936, between Messrs. A. J. Lovell, Vice President, Brotherhood of Locomotive Firemen and Enginemen, and J. A. Farquharson, National Legislative Representative of Brotherhood of Railroad Trainmen, and Mr. C. W. Galloway, Chairman of the Board of Managers of the Terminal Company, discussion was had on certain subjects in question, and following that conference, by letter dated Dec. 14th, 1936, Mr. Galloway advised the said Lovell and Farquharson, that at their request, that pick-ups and set-overs be limited to one movement, which refers to the setting over and picking up of head end of passenger trans, had been accepted and agreed to and that instructions had been issued accordingly; such amendment in the practice relating to this movement has been in effect since said date. From this it is clear that the practice was changed by agreement with the Chairman of the Board of Managers and in full force, and it amounted to *change in contract*—the creation of a new agreement so far as this item is concerned—and not the recognition of any violation of any agreement then in existence. This fairly illustrates the difference between *violations* of agreements in existence and the *creation of new agreements* by the way of amendments to old agreements long recognized by acquiescence, as in this case.

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13. It is most respectfully insisted that what is actually being attempted in this case is to ask your Board to make a new agreement. Contracts may exist by acts of the parties, consistently carried out and acquiesced in over a period of many years, just as effectively as if the terms were reduced to writing and signed. This is the case here. A contract by acquiescence of all the parties has been in existence for 30 years. Your Board is asked to create a new contract. Of course it is well known that is not a function of your Board, but of the Mediation Board.

14. This Company feels your Board is without jurisdiction to change the practices that have been in existence for thirty years and acknowledged by the organizations now appealing to your Board by the fact that they negotiated the agreement to pay employes represented by them when used in such service. It therefore cannot be claimed that there has been any violation of the working agreement, and the fact that in all the years they have worked under this agreement there has been no question until recently, and it is for this reason the Washington Terminal feels your Board is without jurisdiction, because if there is any question it is one that should be negotiated in the same form and manner that the existing rule was negotiated, and with the protection of the law under the Amended Railway Labor Act. In this case the agreement is not in question; they are asking your Board to change an agreement. Therefore, there can be no dispute so long as the agreement is complied with, about which we repeat there is no question.

15. It is admitted that the agreement exhibited with the Employes' submission made on July 27, 1934, was entered into to cover the electrification of certain tracks within the Washington Terminal area for Pennsylvania Railroad exclusive electric operation. The very fact that such an agreement was made to cover this limited purpose is conclusive evidence that the practice, which had existed prior to that time and still exists in general amounted to an agreement by acquiescence well recognized by all parties in interest.

16. The Carrier respectfully calls attention of this Board to the rights of using Railroads to use the tracks and the facilities of the Washington Terminal Company. It has been recognized and observed by Carriers and Employes that under trackage agreements where one Road uses the tracks of another Road, the rights of employes of the

Company whose tracks are used are in no way infringed upon by such use; that in use of the terminal facilities of an owning company by a tenant line, such as use by tenant lines of Washington Terminal Company tracks, employes of tenant lines may properly be required to prepare and dispose of their own trains under the Schedule provisions existing between the tenant road and its employes without in any way encroaching upon the rights of employes of the owning company. Schedule rights remain with the road employes and are not set aside nor reliquished simply because service is performed on another property over and on which the employer has trackage and other rights. This principle was definitely recognized by this Board in Award No. 1763, Docket 3241. In that case there was no question presented of any alleged conflict in rights as between employes of two separate Companies. The Roadmen performed service on the property on which their employer has trackage rights. The rights of those Roadmen and rights of their employing railroad on the property of another railroad was recognized by this Board in that Award. In this case no different situation is present.

17. The Washington Terminal Company desires to call attention of your Honorable Board to the fact that prior to the construction of the Washington Terminal the various Roads operating into the different Stations in Washington made all and even more movements with road crews in picking up or setting off head ends, as to a somewhat limited extent has been the case for some thirty years in the Washington Terminal, and about which this complaint is before you, and the Terminal employes who were taken into the service were in the main from lines whose facilities were abandoned at the time of the opening of the Terminal. It was not intended that the individual requirements in the separate stations should be changed, restricted or penalized by operation in the Union Terminal, yet the practice in this direction has been materially reduced comparatively, and this has obviously been recognized for a period of practically thirty years. And again, we wish to emphasize our claim that there has been no violation of any agreement, and repeat our opinion that the case is not one that properly belongs before your Board.

18. The Carrier respectfully submits that to agree with the Position of the Employes in support of their Statement of Claim would deny rights of both Management and the men affected and deprive the employes of compensation which they receive from exercising their rights to their detriment and loss, and would be a miscarriage of justice—therefore the Carrier requests that the rights of both Management and men be upheld by denial of this claim.

And opportunity for oral presentation is requested.

FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The work described in this docket is within the jurisdiction of the men holding seniority exclusively on the rails of the Washington Terminal Company.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of First Division

Attest: (Sgd.) T. S. McFARLAND,
Secretary.

Dated at Chicago, Illinois, this 24th day of October, 1938.

54 *Answer of Defendants*

Filed February 15 1939

* * *

First Defense

The defendants say that the allegations of the complaint fail to state a cause of action against the defendants.

Second Defense

The defendants say that the allegations of the complaint do not state a cause of action appropriate for the granting of a declaratory judgment against the defendants because:

(1) The complaint fails to show the existence of an actual controversy between the plaintiff and the defendants.

(2) The complaint affirmatively shows that there exists a remedy specially provided by statute for this type of case.

(3) The complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure a judicial review of a decision of an administrative board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act.

(4) The complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff.

Third Defense

1. The defendants admit the truth of the allegations contained in Paragraphs 2, 3, 5, 6, 7, 8, 11, 12, 13, 14,
55 15, 16, 19, 21, 24, 26 and 27 of the complaint, and admit that the Exhibits attached to the complaint are true and correct copies of various documents as indicated by their headings.

2. The defendants deny the allegations contained in Paragraphs 30, 31, 32 and 33 of the complaint.

3. The defendants have no knowledge as to the truth or falsity of the allegations contained in Paragraphs 17, 23 and 25 of the complaint, and hence deny the same for want of such knowledge.

4. Further answering, the defendants say that on February 1, 1923 there was executed by and between the plaintiff and certain persons employed by it as locomotive enginemen and firemen a certain agreement known as a "Schedule of Rules and Rates of Pay for Enginemen and Firemen". The said employees were represented in the premises by the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, the said two Brotherhoods acting through the then General Chairmen of their local organizations. The said Schedule constituted an agreement concerning the rates of pay, rules and working conditions of the said classes of employees. "Exhibit D", attached to the complaint, is a true copy of this Schedule.

5. Articles 8 and 9 of the said Schedule guarantees to the said classes of employees, and to the defendants as members of the said classes, certain rights in connection with their employment regarding promotions, furloughs (in the event of reduction of forces), reinstatements (in the event of increase of forces after prior reduction), choice of positions, filling of vacancies, and the filling of new positions. The said rights consisted of certain recognized preferences among the individual employees in regard to the above matters accorded to them in ratio of their respective periods of service. These rights were, and are, termed "seniority rights".

56 6. Shortly after the execution of this Agreement there arose a dispute between the plaintiff and the defendants, members of the classes of engineers and firemen, as to the correct interpretation and application of the terms thereof. The defendants contended, and still contend, and here allege, that the true intent and purpose of the said Agreement was, and is, to provide that all work generally classified as that of yard engineers or firemen performed upon the tracks of the plaintiff, was and is to be done by the employees of the plaintiff exclusively, they to have rights to, and choice of, the said work in ratio of seniority. The plaintiff, however contended, and still contends that it has the right under this Agreement to secure the services of the employees of other railroads to perform certain of its functions for it, regardless of the seniority rights of the defendants.

7. Acting on this interpretation of the Agreement, the plaintiff maintained, and still maintains, the following practice:

As alleged in Paragraphs 5 and 7 of the complaint the entire business of the plaintiff consists in the operation of a passenger terminal in the City of Washington, D. C., into which run the trains of several main line railroads, termed the Tenant Lines. These lines operate passenger trains from, into and through this terminal, using their own road engines and crews for the purpose. The practice of the plaintiff, which gave rise to the dispute in question, was and is to permit and require the train crews of the Tenant Lines to use the said road engines in the moving of empty and loaded cars and trains of cars from place to place in the yards of the plaintiff, when such movement does not constitute a portion of any through train run, but does constitute a switching service in the said yards.

57 The defendants say further in this connection that at present, and for a long period of time in the past, the plaintiff and the Tenant Lines have recognized that the services described above are properly services of and for the plaintiff, and which it could be required to render. It has been, and now is, the practice to keep a strict accounting between the parties of the amount and value of such services, and periodically the plaintiff is required to pay, and does pay to the Tenant Lines, sums equal to the reasonable value of said services.

8. Attempts were made from time to time, subsequent to 1923, to adjust this dispute but without success.

9. On June 21, 1934 the Congress of the United States enacted a statute known as the "Railway Labor Act" (45 U. S. C., Section 151-163 inclusive), amending an earlier statute known by the same name. In Section Three of the said Act (45 U. S. C., Section 153) provision was made for the establishment of a tribunal known as the National Railroad Adjustment Board. The said Board was given jurisdiction to hear, decide and adjust "disputes between an employee or group of employees and a carrier or carriers growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions". (U. S. C. Title 45, 153 i.)

10. The said statute further provided that the said Board should be divided into four divisions. The First Division to "have jurisdiction over disputes involving employees in train and yard service, and that the said First Division should consist of ten members, five to be selected by the carriers generally, and five by the national organizations of employees whose members were employed in the service indicated. Subsequent to the passage of the said
58 statute the employees, acting through their national organizations, and the carriers (the plaintiff among others) acting through their national association, selected their representatives as members of the National Railroad Adjustment Board, First Division, and the said Board was organized and entered upon the performance of its functions.

11. It was further provided by the said Statute that all decisions of each Division of the said National Railroad Adjustment Board should be by a majority vote of its members, but in the event that the members should be evenly divided as to any case, the Division in question should have authority to select a neutral referee to sit with it and render a decision.

12. After the enactment of the Railway Labor Act the defendants, through their representatives, made further efforts to adjust with the plaintiff the dispute above described, which had been pending since 1923. These efforts met with no success, and the defendants requested the plaintiff to join with them in a joint submission of the dispute to the National Railroad Adjustment Board, First Division. This the plaintiff refused to do. Thereafter, as authorized by the provisions of the Railway Labor Act, the defendants, through their representatives, themselves prepared and filed with the National Railroad Adjustment Board, First Division, their submission of the dispute. The plaintiff was duly notified of this fact, and it thereupon filed its own submission, stating fully its contentions in regard to the matter. The said submissions contained any and all facts, data and arguments which the parties considered relevant to the issue. After due notice and hearing, at which representatives of both the plaintiff and defendants were present, the National Railroad Adjustment Board, First Division, found itself unable to agree upon an

award, and called in a neutral referee as authorized
59 by the Railway Labor Act. The said referee examined and passed upon the contentions of the parties, and decided the dispute in favor of the defendants. The said decision was embodied in an award of the said Board, a copy of which is attached to the complaint as "Exhibit F". Thereafter the said National Railroad Adjustment Board, First Division, issued its order to the plaintiff commanding it to comply with the terms of the said Award, all as set forth in Paragraph 27 of the complaint.

13. After the issuance of the said order the defendants requested the plaintiff to comply with, and apply the said order of the National Railroad Adjustment Board, First Division. This the plaintiff refused, and still refuses, to do. Further efforts have been made by the defendants since the issuance of the said order to adjust their differences with the plaintiff by negotiations, but without success. Thereupon the individual defendants have from time to time filed with the plaintiff claims for compensation for work which, under a proper interpretation of the Agreement of February 1, 1923, and under the order of the National Railroad Adjustment Board, was rightfully work which the defendants should have performed, and for which they should have been compensated, but the performance of which has been secured by the plaintiff through the employment of road crews of the Tenant Lines.

14. Section Three, Paragraph m. of the Railway Labor Act (45 U. S. C. Section 153 m.) declares that any awards or orders of any Division of the National Railroad Adjustment Board shall be "final and binding upon both parties to the dispute except insofar as they shall contain a money award". The Board, however, is given no power to enforce its awards or orders by process, and no power to institute legal proceedings looking to their enforcement. In case
any carrier refuses to comply with any order of any
60 Division of the Board, it is provided that:

"The petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides, or in which is located the principal office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order

of the Division of the Adjustment Board in the premises." (U. S. C. Title 45, Section 153, p.)

It is further provided in this same paragraph as follows:

"Such suit in the District Court of the United States shall proceed in all respect as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

It is also provided that the right to bring any such action for enforcement is limited to two years.

The defendants say that the true intent and purpose of the provisions of the Railway Labor Act above mentioned in this paragraph is to provide a method for the enforcement, and a provision for the judicial review of awards and orders of the National Railroad Adjustment Board, especially adapted to the type of case, and that such method of enforcement and review is exclusive.

15. Further answering the defendants deny each and every allegation of the complaint not heretofore denied, or denied for want of knowledge, or not admitted herein to be true.

16. The defendants therefore say that the plaintiff is entitled to no relief in the premises, and in particular is entitled to no relief by declaratory judgment be-
61 cause:

a. The Schedule or Agreement of February 1, 1923, properly interpreted, does not permit the practice for the continuance of which the plaintiff is contending, i. e., the practice of using road engines and crews for the purpose of moving cars or trains of cars upon the tracks of the plaintiff when such movement forms no part of the through run of any train.

b. There is no actual controversy between the parties hereto inasmuch as any dispute or controversy which may

have existed in the past has been decided and adjudicated by the National Railroad Adjustment Board, a tribunal having special jurisdiction by statute to decide such disputes or controversies.

c. The practice and procedure of the National Railroad Adjustment Board in this case secured to the plaintiff a full and fair hearing, and a full and fair opportunity to present all facts and arguments which it considered relevant to the case.

d. Remedy by declaratory judgment cannot be invoked to review a decision of an administrative tribunal where a specific means of review has been provided by statute for the type of case in question.

62 WHEREFORE, the defendants pray judgment of the Court that the complaint of the plaintiff be denied and dismissed at the plaintiff's costs.

FRANK L. MULHOLLAND
CLARENCE M. MULHOLLAND
WILLARD H. McEWEN
HAROLD C. HEISS
RUSSELL B. DAY
WILLIAM E. WILLIS
Attorneys for the Defendants.

Order Assigning Defenses for Advance Hearing

Filed March 2- 1939

* * *

Upon consideration of the plaintiff's motion to call up defenses for preliminary hearing, filed herein on February 21, 1939;

It is ORDERED this second day of March, 1939, that defendants file their points and authorities in support of their First Defense and in support of their Second Defense, incorporated in their said answer of February 15, 1939, on or before March 20, 1939, and that the plaintiff file its points and authorities in opposition thereto within fourteen (14) days thereafter, and that said First Defense

and said Second Defense thereafter shall be placed on the Motions Calendar for hearing in regular order.

JENNINGS BAILEY
Justice.

We consent:

FRANK L. MULHOLLAND
WILLIAM E. WILLIS
Attorneys for defendants.

SYDNEY R. PRINCE, JR.
Attorney for plaintiff.

63 MEMORANDUM BRIEF OF DEFENDANTS
Filed March 20, 1939

* * *

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Section 3, Paragraph First (i)	19, 76	86	85
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Memorandum Brief of Defendants

Filed March 20 1939

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NATURE OF THE CASE

The motion of the plaintiff calls to the Court's attention the fact that the first two defenses of the answer raise legal issues. The defenses in question are in brief: (1) that the complaint fails to state a cause of action under the Declaratory Judgments Act, and (2) that the complaint fails to state any cause of action.

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By its motion the plaintiff has called upon the defendant to support these defenses in a hearing prior to trial, a procedure sanctioned by the new Federal Court Rules. As we understand this procedure, the ordinary rules regarding motions to dismiss are applicable, i. e., all facts well pleaded in the complaint must be considered as being admitted. Our first task, therefore, will be to endeavor to formulate from the complaint a fair statement of the facts in the case.

STATEMENT OF FACTS

In 1907 the plaintiff company began its operations which have, throughout its existence, consisted in the furnishing of passenger terminal facilities for certain carriers referred to in the complaint as "Tenant Lines". Its tracks are purely switching and terminal tracks; it operates no main line road service; its locomotive and train crews engage in switching operations only.

It is the practice of this carrier that all through trains coming into the station are brought in by the road engines and crews of the tenant line on which the train originates. No question is raised regarding this practice. In addition, however, it is further the practice to require these same engines and crews to perform certain operations in connection with the making up and breaking up of trains. Cars are added to, or taken from, trains; empty trains are moved into or out of the station, and are, to some extent, moved about in the yards by these road engines. It is claimed that this service

is not a "switching" service, but it is apparent that certainly it is not in any sense a road service. This practice of using road engines and crews, furnished by the tenant lines, in performing the operations in question is the *practice* which has given rise to dispute.

It remains to consider the reason why the propriety of this practice is in question. It appears from the complaint that at intervals from 1910 to 1923 various schedules or agreements as to working conditions affecting train crews were effective on this property. The first two of these were posted by unilateral action of the carrier, the third was negotiated between the Director General of Railroads and the various brotherhoods representing the classes of employees involved, and the last was negotiated by the carrier and the brotherhoods and is still in effect.

This last agreement, as well as its predecessors, contained provisions regarding the seniority rights of employees. At this point we believe it may prove helpful to the Court to explain the significance of the term "seniority right". The word "seniority" refers to the length and continuity of service of employees in relation to one another. "Seniority rights" are those rights which, by agreement, accrue to the individual employees in ratio of their seniority. The various Exhibits attached to the complaint, and in particular Exhibit C, Paragraphs 8 and 9, and Exhibit D, Paragraphs 8 and 9, show the nature of these rights. It appears that in the event of lay-offs employees are to be released in inverse

order of seniority, while re-employment is to be in direct order of seniority. Demotions and promotions are to be handled in the same manner. In the event of a vacancy, or in the event of the establishment of a new position, employees are to be notified by bulletin, and they may "bid" for the position—seniority to govern in the selection. The above list of seniority rights provided by this agreement is not exhaustive, but is illustrative as to their nature, and as to the reason why they are valued and jealously guarded by employees.

It must be apparent that the use of the term "seniority rights" implies the existence of a *territorial unit* within which those rights may be exercised; that is, on a certain unit of railroad operations there are a certain limited number of jobs available to those employees who have seniority rights within that unit. Such units are ordinarily termed "seniority districts", and, in the case of train service men, are usually the operating divisions or groups of divisions of the railroad. In the case of smaller operations, as here, the entire system of the railroad may constitute a single seniority district.

Seniority rights which are not effective over a fixed district are necessarily valueless, as the carrier might, by expanding or contracting districts at will, virtually nullify the rights of employees by limiting or eliminating the area within which they might be exercised.

From the foregoing we may clearly understand the nature of the controversy which has existed between the plaintiff and its train service employees. It is the contention of the latter that they have a right under the

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Agreement of 1923 to perform all work in the nature of switching service which is carried on over the tracks of the plaintiff, i. e., their seniority district. It is the contention of the plaintiff that the work performed by the road engines, while not mentioned in the Agreement, is excepted from its provisions because it has been performed by road crews both before and since the effective date of the Schedule. In other words, the plaintiff contends that by custom and usage this work, while admittedly performed over the plaintiff's tracks, is really not the work of the defendants' seniority district, but it forms a sort extra-territorial extension of the various seniority districts of the road crews of the tenant lines. This the plaintiff contends is a part of the Agreement by implication.

It is thus apparent that the dispute between the parties to this case is one growing out of the interpretation and application which the carrier has made of the Collective Agreement of 1923, and that it has existed for some time.

Efforts were made from time to time to adjust this dispute in conferences between the parties, but without success. Thereafter, the dispute was duly submitted by the employees to the National Railroad Adjustment Board, First Division, for adjustment. This Board is an administrative tribunal set up in accordance with the provisions of a Federal statute known as the Railway Labor Act as amended June 21, 1934. (Relevant portions of this Act are copied in Appendix 1.) We shall discuss

the organization and functions of this Board in another section of this brief. It will suffice for our present purpose to note that in the adjustment of this dispute the Board was confronted with the necessity of considering the proper interpretation of the agreement in question. The procedure of the Board as established by the statute and applied in this case will also receive full discussion later herein.

After considering the whole case the Board issued a formal award embodying a decision favorable to the contentions of the employees, and subsequently issued an order to the plaintiff to apply the said award. It should be noted that orders of the National Railroad Adjustment Board are not enforceable by any process or action on the part of the Board. They depend for their enforcement upon suits instituted in the Federal courts by the parties benefited by the order.

The defendants have requested the plaintiff to apply the order of the Board. This the plaintiff has refused to do with the result that certain claims are accumulating against it for work which the defendants claim to be entitled to perform, and which the plaintiff has permitted the employees of the Tenant Lines to perform in their stead.

The plaintiff now brings this action seeking a declaratory judgment.

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ANALYSIS OF ISSUES

The relief which the plaintiff seeks is two-fold. First, it asks an interpretation of its rights and those of the defendant under the Collective Agreement of February 1, 1923; second, it asks the Court to invalidate the award and order of the National Railroad Adjustment Board both because of errors of law alleged to have been committed by the Board, and because of the asserted unconstitutionality of the Railway Labor Act which established the tribunal and fixed its jurisdiction.

Otherwise expressed, the plaintiff desires this Court to set aside a decision of an administrative board, to reexamine the subject matter of that decision, and to issue its own judgment on the merits. Without question, therefore, the action is one looking toward a judicial review of an administrative order. This review is sought through the medium of a declaratory judgment.

The defendants have challenged the sufficiency of the complaint on the ground that it does not set forth facts sufficient to justify the issuance of a declaratory judgment and indeed fails to state any cause of action at all. The latter of these two positions will be reserved for a later section of this brief, and we will for the present confine ourselves to the first.

Prior to the enactment of the Declaratory Judgments Act (U. S. C. Title 28, Article 400), the jurisdiction of the Federal Courts was in general limited to controversies involving the classical conception of a cause

of action, i. e., a right, its violation and consequent damage. The Act extended that jurisdiction by eliminating the requirement of actual violation of a right and resulting damage and substituting therefor the requirement merely of an actual controversy as to the existence of rights. Thus, where such a controversy exists the litigant needs not violate his adversary's claimed right before testing its existence in Court. This broad extension of jurisdiction, however, is qualified by certain well defined limitations which have been placed upon it.

First. It is well established that it is not the purpose of the Declaratory Judgments Act to permit the Courts to give advisory opinions on abstract legal questions. In the words of the statute, an "actual controversy" must exist. That is, there must be such a disagreement between the parties as to the existence of mutual legal rights and obligations that a proposed course of action by one party will result in the imposition of legal damage upon him if he is mistaken in his contention. Thus for a party to be able to invoke the Declaratory Judgments Act, he must show that the subject matter of the controversy is such as to imperil him or threaten him with liability for damages. As above noted, the plaintiff is seeking two declarations from the Court. The first being an interpretation of an agreement, the second a declaration of the invalidity of an order of the National Railroad Adjustment Board. Before the plaintiff can secure relief as to either of these matters it must establish that the agreement in the one case, or the order of

the Board in the other, may be interpreted in such manner as to actively imperil the plaintiff's rights. The order of the Board is not susceptible to such an interpretation, however. We will point out below that the order is in itself unenforceable, and that the plaintiff has not shown, and cannot show, any possible injurious consequences to itself arising from that order however it may be interpreted.

Second. From what has been said it is apparent that the Declaratory Judgments Act was designed as a method of deciding *undecided* controversies, not as a method of re-submitting to the Court issues already passed upon by a different tribunal, with the hope of obtaining a different result. In other words, the procedure established by the Act is not a procedure for *review.* As the gist of the plaintiff's action in this case is to secure such review, its complaint is fatally defective.

Third. It is agreed by all authorities that the procedure of the Declaratory Judgments Act may not be used as a substitute for a procedure specially provided by statute for the type of case in question. We will show that the Railway Labor Act provides a statutory method for the review of decisions of the National Railroad Adjustment Board, which method forms an integral part of the regulatory scheme of the statute. It follows, therefore, that the procedure invoked in this action cannot be substituted for that provided in the Railway Labor Act, and on the face of its complaint the plaintiff is not entitled to the relief which it seeks.

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Fourth. The plaintiff alleges that the Railway Labor Act is void in that it seeks to vest judicial power in an administrative board. While we believe that a consideration of the three issues named above will satisfy the Court that this is not an appropriate case for the issuance of a declaratory judgment, we shall in addition support the position that the power exercised by the National Railroad Adjustment Board is an administrative power only, and is in no sense judicial.

In summary, therefore, the defendants will maintain the following positions in support of their contention that the complaint fails to state facts sufficient to justify the Court in the issuance of a Declaratory Judgment:

I. A Declaratory Judgment will not be granted as a substitute for another remedy prescribed by statute for the particular type of case.

II. A Declaratory Judgment will not be granted as a means of reviewing the decision of another tribunal.

III. A Declaratory Judgment passing upon the validity of an administrative order will not be granted where the plaintiff is not imperiled by the order.

IV. The Railway Labor Act does not vest judicial power in the National Railroad Adjustment Board.

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ARGUMENT

I. A Declaratory Judgment Will Not Be Granted As a Substitute for Another Remedy Prescribed By Statute for the Particular Type of Case.

The Rule of Law.

In the early days of the Declaratory Judgments Acts and to some extent even today, there has been considerable conflict among the Courts on the question of whether one seeking a declaratory judgment must show that he has no other adequate remedy available. This conflict has been set at rest for the Federal Courts by the adoption of Court Rule No. 57 which provides that:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

We mention the above doctrine and its repudiation in the Federal Courts merely for the purpose of clarifying the issue here. The defendants' objection to this proceeding is not based on the existence of another adequate remedy either at common law or in equity, but upon the existence of a specific remedy prescribed by statute for this exact type of case.

It is clearly established by authority that where such statutory remedy exists a court may not issue a declaratory judgment in the premises for to do so would nullify the provisions of the statute which sets up the special remedy.

Thus the Conference Committee which assisted in the preparation of the present Federal Court Rules in its note regarding Rule No. 57 explicitly states:

> "A declaration may not be rendered if a *special statutory proceedings* has been provided for the adjudication of some special type of case, but gen-

eral, ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings."

(Emphasis supplied.)

In American Jurisprudence, Volume 16, page 295, we find the following statement:

"A court will not take jurisdiction to render a declaratory judgment where another *statutory remedy has been especially provided for the character of case presented,* if the effect would be to interfere with the right of the parties to appeal to the court given jurisdiction in that particular matter by the statute. Likewise, a declaration will not be made where the purpose is to affect proceedings which may be taken before a public board which has full power to act in the matter and which would not be bound by the declaratory judgment. In accordance with this principle, the courts have refused to enter declaratory judgments in respect of such questions as the validity of assessments, the time for which an employee is entitled to compensation under the Workmen's Compensation Law, the inheritance of personal property, and the status of the plaintiff as the natural son of defendant, where jurisdiction as to these questions was given to other courts or boards."

(Emphasis supplied.)

Professor Borchard, co-author of the Uniform Declaratory Judgments Act, whose treatise on this subject has been widely quoted, states in this connection as follows:

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"Where, however, a *special statutory* method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case, and it was not intended that a declaration should be employed for such a purpose."

(Borchard on Declaratory Judgments, pages 156-7.)

(Note: Emphasis the Author's.)

And further:

"Nor as already observed, will the court permit a special tribunal having statutory jurisdiction of the express type of case sub judice, or given jurisdiction by agreement of the parties, to be ousted of its jurisdiction by a petition for a declaration in the ordinary courts."

(Borchard on Declaratory Judgments, p. 180.)

A leading case in the interpretation of the Declaratory Judgments statutes is that of *Petition of Kariher,* 284 Pa., 455, 131 Atl. 265, decided in 1925. The Supreme Court of Pennsylvania made the following statement as to the law:

"In all jurisdictions where declaratory judgment practice obtains, the rule is established * * * that a proceeding to obtain such a judgment will not be entertained * * * where another statutory

remedy has been specially provided for the character of case in hand."

See also to the same general effect, *City of Erie vs. Phillips*, 323 Pa. 527; 187 Atl. 203; and *Bell Telephone Company of Pennsylvania vs. Lewis*, 313 Pa. 374; 169 Atl. 571.

Another Pennsylvania case, that of *McCalmont vs. McCalmont*, 93 Pa. Sup. Crt. 203, involved an action for declaratory judgment seeking to annul a marriage. The relief sought was refused, the Court saying:

"The State is a party in interest in divorce proceedings and in order to guard against collusion between the parties has prescribed certain forms and procedure which must be observed, including an oath or affirmation by the libellant that the facts contained in the petition or libel are true, to the best of his or her knowledge and belief, and that said complaint is not made out of levity or by collusion and for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in said petition or libel; followed by proceedings in court or before a master calculated to sift the evidence thoroughly and satisfy the court of the truth of the matters averred in the libel * * *.

"These safeguards instituted on behalf of the the State cannot be swept away by recourse to the Declaratory Judgments Act of 1923. *It should not be resorted to where, as here, a method has already been established for the speedy determination of the issues involved with due regard to the*

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interests of the State as well as of the parties libellant and respondent.''

(Emphasis supplied.)

In the case of *Young vs. Bridges,* 86 N. H. 135, 165 Atl. 272, a declaratory judgment was asked as to the distribution of an estate. It was held that inasmuch as jurisdiction in such matters was specifically conferred upon the Probate Court by statute, other courts could not be asked to pass thereon through the medium of a declaratory judgment. A similar conclusion was reached in the case of *Stewart vs. Hertin,* 125 Neb. 210, 249 N. W. 552, which involved a guardianship matter.

The Court of Appeals of the State of Kentucky applied the same rule of law in the case of *Moore vs. Louisville Hydro-Electric Company,* 226 Ky. 20, 10 S. W. (2d) 466. In this case the plaintiff had instituted proceedings under the Workmen's Compensation Act of the State for certain alleged injuries. His claim was allowed by the Workmen's Compensation Board as to some particulars, but was rejected insofar as it related to a claim of hernia. The decision as to the hernia was appealed to the Circuit Court and sustained, but was later reversed by the Court of Appeals and compensation ordered. Thereafter another controversy arose as to the time during which plaintiff was entitled to be compensated for the hernia, and this action was filed seeking a declaratory judgment on that point. A demurrer to the petition was sustained in the Circuit Court, which ruling

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was upheld by the Court of Appeals. The latter court said:

> "It has been often written that the Workman's Compensation Law is *in the nature of an arbitration, and was intended to provide a simple and speedy method whereby employees might be compensated for injuries received.* The entire mechanics of the law shows that it was the legislative intent to vest exclusive, original jurisdiction to hear and determine matters within the purview of the Act in the Workman's Compensation Board. Provisions are made for a review of the findings of that board by the Circuit Court, and an appeal may be taken from the judgment of the Circuit Court to this Court. If the employee may ascertain that he and the employer do not agree about the length of time for which he is entitled to compensation, and then file a petition for a declaration of his rights, likewise the employer may ask for a declaration of rights, and in that way *substitute the Circuit Court and this Court for the Workman's Compensation Board in determining many questions, the determination of which is vested by the law in the Workman's Compensation Board. We cannot approve thus invading the jurisdiction of that Board.*"
>
> (Emphasis supplied.)

The same principle was stated by the United States Circuit Court of Appeals for the Fourth Circuit in the case of *Aetna Life Insurance Company vs. Quarles*, 92 Fed. (2d), 321:

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"The Court will refuse a declaration where another Court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, *where a special statutory remedy has been provided,* or where another remedy will be more effective or appropriate under the circumstances."

(Emphasis supplied.)

From an examination of these authorities there can be no question but that remedy by declaratory judgment is not available as a substitute for a prescribed statutory procedure.

Procedure Prescribed by the Railway Labor Act.

Having determined the nature of the applicable rules of law, it remains to be established that the Railway Labor Act prescribed a definite procedure to be followed in this type of case. We shall therefore direct the Court's attention to the nature of the case involved, the organization and development of the administrative agency which has been set up to deal with these cases, and to the statutory provisions governing the review of the orders of that agency. We shall show that all of these form integral parts of a statutory scheme for the handling of a certain type of case, a scheme designed to preserve the public interest by insuring the continuance of the agencies of interstate commerce uninterrupted by labor controveries.

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The Type of Case It has long been the policy of Congress to foster the development of collective bargaining between carriers and their employees as a means of avoiding labor disputes which might interrupt the functioning of the nation's railroads and inflict serious damage on the public. Disregarding some of the older attempts to accomplish this result, modern efforts along this line were begun with the enactment of the Transportation Act of 1920, and were continued by two later statutes—the Railway Labor Act of 1926 and the Railway Labor Act as amended in 1934. The last named statute is now in effect.

A reference to "collective bargaining" calls to mind a system whereby the employer and the selected representatives of the employees meet to negotiate a collective agreement fixing the wages and terms of employment of the employees as a group. This phase of collective bargaining is well understood. The execution of a collective agreement, however, is only the beginning—not the end of the collective bargaining process.

Such an agreement by its nature covers a large number of varied individuals and situations. If a collective agreement is made, therefore, there will inevitably arise controversies as to exactly how the agreement shall be applied in specific cases. Such controversies, while not as broad in scope as those relating to making or changing agreements, may nevertheless cause as grave disputes between the parties, and in the aggregate may as seriously threaten the disruption of the industry.

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The Railway Labor Act of 1934 recognizes the existence of such disputes and the importance of providing a method for adjusting them. It provides this method in these words:

> "Section 3. First (i) The disputes between an employee or group of employees and a carrier or carriers *growing out of grievances or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."
>
> (Emphasis supplied.)

Therefore, the type of case for which Congress established the procedure provided in the Railway Labor Act is one involving disputes between carriers and employees growing out of grievances, or out of the interpretation or application of collective agreements.

We have pointed out above that the dispute between the plaintiff and the defendants in the present case is one growing out of the interpretation which the plaintiff has put upon the Collective Agreement of 1923. Accordingly there can be no question but that the case at hand is one of those with regard to which Congress saw fit to legislate.

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Organization and Development of National Railroad Adjustment Board.

The statutory foundation for the National Railroad Adjustment Board is to be found in the various paragraphs of Section 3 of the Railway Labor Act. A summary of these provisions will probably be more helpful to the Court than detailed quotations from them. (For the provisions in question see Appendix I.)

In brief, this Board is a body composed of representatives selected by the carriers and by the national organizations of employees in *equal* numbers. The Board is divided into several divisions, the First Division being the only one with which we are concerned. This Division, whose jurisdiction is confined to disputes involving train and yard service employees, is composed of ten (10) members, five (5) of whom are selected by the carriers and five (5) by the five labor organizations whose members are engaged in train and yard service. Both in personnel and in organization this Board departs somewhat from traditional *judicial* concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just and he will prevail. The judge is learned in the law, but

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must be informed by the parties as to the practical aspects of each case. A member of the Adjustment Board has probably only a layman's understanding of the law, but a wide practical knowledge of the field in which the tribunal operates. A judge *decides* the case before him, while, as its name implies, this Board is intended to adjust matters submitted to it. "Compromise" judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created.

The organization of the Board may seem anomalous at first glance. The anomaly disappears, however, if it realized that the Adjustment Board takes as its pattern *not the courtroom but the conference table.* Its members are *representatives* or *advocates,* rather than arbiters. It is provided in the Railway Labor Act that any award of any Division of the Board must be concurred in by a majority of the members. If the regular members are unable to reach an agreement, a neutral referee is called in to sit and vote with them for the purpose of breaking the deadlock. (See Railway Labor Act (Section 3, First (1) in Appendix I.) If such referee is selected, the Board then adopts a quasi-judicial formula of procedure. The members then become adversaries indeed and actively urge their respective views upon the referee to whom their differences are, in effect, submitted for decision.

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That Congress chose to establish the National Railroad Adjustment Board according to this exact pattern is made clear by the terms of the Railway Labor Act. The selection of this pattern was not made as a matter of chance or whim. The Adjustment Board was organized as it was because long years of successful experience had revealed this sort of organization as the one most likely to accomplish the Congressional purpose of establishing industrial peace on the railroads.

Both employers and employees who desire harmonious labor relations have long been aware of the advantages offered by the conference room. A conference between the employee who has a grievance, and his immediate supervisor *may* bring a ready adjustment of the matter. Too often, however, the attitudes of the direct participants are warped by prejudices and predelections of a personal or local nature. The conference is more likely to succeed if held between *representatives* of the parties, just as attorneys can often arrange settlements of legal actions when their clients cannot.

If an adjustment is not reached in conference on the property between local representatives of the persons who are involved in the dispute, the next logical step is to submit the controversy to a conference off the property, between representatives selected by the carriers generally and by employees generally—or in other words, to an adjustment board.

While local or system adjustment boards have been employed for a long time as a means of settling disputes

between train service employees and the carriers, the first use of this procedure which was other than local in character, was embodied in a document known as the "Joint Settlement Awarded by the Committee of National Defense". This was the instrument which formally ended the "8-hour day" controversy during the World War. The "Settlement" which was dated March 19, 1917, contained the following provision:

> "It is further agreed that if any differences arise over the application of the foregoing award, they shall be referred to a standing Commission of Eight, four to be chosen by the National Conference Committee of Railways and four by the railroad brotherhoods. A majority decision to be binding."

The said "Commission of Eight" was duly selected as provided, and applied the settlement awarded by the Council of National Defense to approximately 225 railroads involving nearly 900 agreements and in doing so was required to make approximately 30,000 decisions. While the Commission of Eight was made up of an equal number of representatives of the employees and the railroads, it disagreed on only 3 cases; that is, there were only three matters submitted to the Commission upon which agreements were not reached.

On March 22, 1918, the Federal Director-General of Railroads issued his General Order No. 13, which approved and made effective a memorandum of understanding between the Regional Directors of the railroads and the executive officers of the Train Service Labor

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organizations. This order established a tribunal known as Railway Board of Adjustment No. 1, which was to adjust disputes growing out of the interpretation and application of agreements concerning rates of pay, rules and working conditions of train service employees. A copy of a portion of this memorandum is attached to this brief as Appendix II. An examination of certain portions which we have italicized in the Appendix will reveal that the National Railway Labor Act borrowed freely from its phraseology.

This order was followed by General Order No. 29 (May 31, 1918) and General Order No. 53 (November 13, 1918) which provided similarly for Railway Boards of Adjustment Nos. 2 and 3, which were to have jurisdiction respectively over disputes involving shopcraft employees and disputes involving telegraphers, switchmen, clerks and maintenance-of-way employees.

During the period of Federal control, Railway Board of Adjustment No. 1 decided 3,000 cases without an appeal; Board No. 2 decided 2,000 cases with less than 10 appeals; and Board No. 3 decided 1,100 cases with only one appeal.

The following excerpt from the Report to the President by Walker D. Hines, Director-General of Railroads, for the 14-months period ending March 1, 1920, indicates the character of service rendered by the Boards of Adjustment during the period of Federal control:

> "At the beginning of the Railroad Administration in 1918 the Division of Labor was created as

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a division coordinate with the other divisions in the Railroad Administration and Mr. W. S. Carter, president of the Brotherhood of Locomotive Firemen and Enginemen, was appointed to the position of director of that division and has held it through the life of the Railroad Administration.

"One of the early steps taken and an exceedingly important step, was the creation of certain bi-partisan boards of adjustment to deal with grievances of employees which could not be settled on the railroads between the local managements and the representatives of the employees. The principle of collective bargaining was frankly recognized in the creation of these boards because they were created by agreement between the representatives of the railroad labor organizations on the one hand and the regional directors of the United States Railroad Administration on the other hand. The work of these boards of adjustment has been eminently satisfactory. Each board has been composed of an equal number of expert representatives of the management and expert representatives of the employees. With a full practical knowledge of the problems the members of these boards have approached their work with the desire to do justice and with the recognition of the importance of reaching an agreement. The result is that in the several thousand cases which have come before the three boards which have been created there has been an agreement in practically very case.

"Various orders of the Director-General have established reasonable rules and working condi-

tions, which were applicable in the very numerous cases where no rules and working conditions had been established prior to Federal control, and in some cases the rules and working conditions established by the Director-General have, by agreement, become a substitute for those which prevailed by agreement prior to Federal control.

"As a result of these defined working conditions and these boards of adjustment, the employees generally have felt that they were much better protected than formerly against arbitrary action.

"Naturally such a system requires time for it to be fully understood and successfully carried out by the vast number of local officials who are responsible for discipline and by the local labor representatives who with the local officials deal with grievances. Inevitably at first the new system had the effect in many instances of raising a question as to the authority of the local officials and caused some discouragement on the part of some of them and some misconception of the situation on the part of some employees. Nevertheless, the system has fully justified itself, and it is only a question of time and mutual understanding when local incidents of a discouraging character will disappear.

"It is an interesting commentary that on some of the largest railroads in the country, with the strongest and most effective managements, not a single case has come to one or more of these boards of adjustment. The local managements have dealt with the classes of employees repre-

sented on such board or boards so reasonably as to obviate the necessity for appealing thereto any grievances at all, and the committees representing the employees have adopted a reasonable attitude and avoided appeals to the Boards of Adjustment. Eventually this same successful treatment should be manifest on all the railroads and as to all classes of employees, if the system shall be maintained in some proper form."

These various Railway Adjustment Boards were dissolved in 1920 inasmuch as the period of Federal control of railroads was then terminated by the Transportation Act of that year. Title III of this statute contained certain provisions designed to stabilize labor relations on the railroads. The device of Adjustment Boards was retained, although their establishment was made voluntary and not compulsory. Their jurisdiction was limited to disputes "involving only grievances, rules or working conditions", which is similar to the jurisdictional limit of the present Adjustment Board.[1]

Under this Act there were organized what were known as "Regional Train Service Boards of Adjustment"; one was established for the Southeastern Region on May 31, 1921; for the Western Region on August 25, 1921; and for the Eastern Region on November 9, 1921. The agreements setting up these boards were all sub-

[1] For the ready reference of the Court we reproduce here a portion of the Transportation Act of 1920:

"Sec. 301. It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and

stantially the same. Excerpts from that establishing the Southeastern Regional Board are reproduced as Appendix III hereof. As in the case of General Order 13 and the memorandum incorporated, the phraseology will be found to be similar to that used in the present Railway Labor Act.

The United States Railroad Labor Board which is referred to in the agreement above mentioned as an appellate tribunal to which disputes could be referred in the event that the regional board could not agree upon an award was created by the provisions of the Transportation Act of 1920. It consisted of nine members, all appointed by the President, with the advice and consent of the Senate. Three members, however, were appointed from nominees submitted by the carriers and three from those submitted by the employees. This Board had jurisdiction of (1) disputes relating to wages (which, as we have seen above, were not within the jurisdiction of the Adjustment Boards), and (2) disputes where the

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the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provision of this title is authorized to hear and decide such dispute (41 Stat. L. 469).

Sec. 302. Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof (41 Stat. L. 469).

Sec. 303. Each such Adjustment Board shall * * * receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving only grievances, rules or working conditions, not decided as provided in section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of section 302, represented upon any such Adjustment Board (41 Stat. L. 469)."

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Adjustment Boards had jurisdiction but had found themselves unable to agree.[1]

This Board functioned with fair success for several years until it was held that its orders lack legal sanction (*Penn. R. R. Co. vs. U. S. Railway Labor Board*, 261 U. S. 72; *Penna. System, etc. vs. Penna. R. R. Co.*, 267 U. S. 203). After the decisions in the above cited cases the Board lost much of its influence. Consequently the whole situation under the Transportation Act became so unsatisfactory that the carriers and employees joined in asking Congress to repeal Title III of this Statute, and to enact in its stead a new statute, the Railway Labor Act of 1926.

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[1] We copy here further relevant provisions of the Transportation Act:

"Sec. 304. There is hereby established a board to be known as the 'Railroad Labor Board' and to be composed of nine members as follows:

(1) Three members constituting the labor group representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe; (2) Three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and (3) Three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate. Any vacancy on the Labor Board shall be filled in the same manner as the original appointment. * * * (41 St. L. 470)

"Sec. 307 (a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. * * * (41 St. L. 470)

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This latter Act also considered that the best available means of adjusting disputes growing out of grievances, or out of the interpretation or application of collective agreements was afforded by the now familiar device of Adjustment Boards. It therefore continued the pre-existing policy of the Government in this regard.[1]

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[1] The following excerpts are from the Railway Labor Act of 1926:

"Sec. 3. First. Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.

"The agreement—

"(a) Shall be in writing;

"(b) Shall state the group or groups of employees covered by such adjustment board;

"(c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute;

"(d) Shall provide that the parties may be heard either in person, by counsel, or by other representative, as they may respectively elect, and that adjustment boards shall hear and, if possible, decide promptly all disputes referred to them as provided in paragraph (c). Adjustment boards shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in the dispute;

"(e) Shall stipulate that decisions of adjustment boards shall be final and binding on both parties to the dispute; and it shall be the duty of both to abide by such decisions;

"(f) Shall state the number of representatives of the employees and the number of representativs of the carrier or carriers on the adjustment board, which number of representatives, respectively, shall be equal;

"(g) Shall provide for the method of selecting members and filling vacancies;

"(h) Shall provide for the portion of expenses to be assumed by the respective parties;

"(i) Shall stipulate that a majority of the adjustment board members shall be competent to make an award, unless otherwise mutually agreed;

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The United States Railroad Labor Board was abolished by the Railway Labor Act of 1926, and there was established instead a board known as the National Board of Mediation, whose functions were quite different from those of its predecessor. The new Board had no power to decide any dispute or to make any order enforceable or otherwise. Its sole authority was to attempt to bring the parties into agreement by mediation.

After the enactment of the Railway Labor Act there was established by agreement a fourth train service board of adjustment; this one having jurisdiction over the Southwestern Region. In addition some system boards were created whose authority extended only to the system involved. Many carriers, however, refused either to become parties to the agreements establishing regional boards, or to agree to establish system boards. Thus the boards of adjustment which were established and did function under the Railway Labor Act of 1926 covered only a portion of the nation's railroad system.

In addition, however, the Act provided no effective method of handling cases to a conclusion where the members of the board disagreed, and a deadlock resulted. Of course, no appeal could be taken to the United States Railroad Labor Board for that body had been abolished,

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"(j) Shall stipulate that adjustment boards shall meet regularly at such times and places as designated; and

"(k) Shall provide for the method of advising the employees and carrier or carriers of the decisions of the board.

"Second. Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish."

and in any event its decisions had lacked binding force. The experience of the National Board of Mediation in attempting to mediate disputes where the various adjustment boards had failed to agree was so unfortunate as to cause it to become reluctant to take jurisdiction.

Even with these handicaps, however, the Regional Boards of Adjustment had disposed of the following numbers of cases prior to June 21, 1934:

Western Board	6,013
Eastern Board	1,408
Southeastern Board	1,140
Southwestern Board	808
Total	9,369

The reverse of the picture is shown by the fact that prior to the date mentioned, the Western Board had deadlocked and released jurisdiction over 374 cases which it had been unable to settle. The Eastern Board had deadlocked in 24 cases. No statistics are available as to the situation regarding the other two Regional Boards, or any system boards which may have been operating, but the number of deadlocked cases is known to have been large.[1]

The existence of this whole situation prompted Congress to give further consideration to the problem, and

[1] It must be remembered that the statistics given above are only for those boards of adjustment effecting train service employees. In the case of the other seventeen crafts or classes of railroad employees where, if adjustment boards existed at all, they were system rather than region boards, the number of deadlocked cases was staggering, although no exact statement is possible.

on June 21, 1934, there was enacted the Amended Railway Labor Act. This statute further continues the established Federal policy. Opportunity is still freely given to any carrier or group of carriers and its or their employees to establish or maintain system or regional adjustment boards.[2]

In case such boards are not desired, however, provision is made for the National Railroad Adjustment Board, a tribunal the scope of whose operations is nation wide. It is provided that the Board and its various divisions are to be organized on the now familiar bi-partisan plan. The only material change in organization was made by providing that in the event the Board is unable to agree, a non-partisan referee shall be selected to sit with the members and with them decide the case.

In addition to this deviation from the typical, in the matter of organization, the statute expressly makes orders of the Board "final and binding upon both par-

[2] Section 3. Second of the Act provides as follows:
"Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

ties to the dispute except insofar as they shall contain a money award."[1]

From other sections of the Act, however, it is apparent that the "finality" given to the awards of the Board is an administrative finality only. There is no intention of attempting to preclude a judicial review. There is no power given to the board to enforce its orders. Both review and enforcement are provided for in Section 3, First (p), which reads as follows:

> "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts

[1] "Section Three. First. (m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

therein stated, and except that the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The District Courts are empowered, under the rules of the Court governing actions at law, to make such order and enter such judgment by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

The provisions of this paragraph are almost identical with the provisions of the Interstate Commerce Act relating to the enforcement and review of reparations orders of the Interstate Commerce Commission, and are also virtually identical with the provisions of the Packers and Stockyards Act relating to the enforcement and review of similar orders of the Secretary of Agriculture. The similarity of language is so striking as to lead to the conclusion that the provisions of the Railway Labor Act were copied from the other two statutes mentioned, and were designed to have similar legal consequences. Those provisions of the Interstate Commerce Act and of the Packers and Stockyards Act which are relevant in this connection are set forth in Appendix IV of this brief.

We do not understand that any question is being raised in this case as to the constitutional adequacy of

the prescribed method of review of the Adjustment Boards' decision. Indeed this question is no longer open in view of the decisions of the Courts upholding the constitutionality of the similar provisions of the Interstate Commerce Act and of the Packers and Stockyards Act. (See *Meeker vs. Leigh Valley R. R. Co.*, 236 U. S. 412; *Southern Ry. Co. vs. Eichler*, 56 Fed. (2d) 1010, and *Sullivan vs. Union Stockyards Co.*, 26 Fed. (2d) 60.) For the purposes of this case, therefore, we can assume the constitutionality of these provisions for review.

From all of the foregoing discussion certain factors stand out clearly:

First—Congress was faced with the necessity of providing a means for settling disputes between carriers and employees arising out of grievances, or out of the interpretation or application of collective agreements.

Second—In seeking a means of accomplishing the purpose of adjusting such disputes Congress turned to an already proven administrative device—that of adjustment boards.

Third—In the event that a carrier might consider the order of the Board to be in violation of its legal rights, it seemed to Congress both just and necessary to provide a method for judicial review of such orders.

The review process adopted was not the result of a haphazard selection, but forms an integral part of the whole Congressional plan. That plan, as we have seen, has its cardinal principal that the parties should be given every inducement to agree upon a practicable set-

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tlement of their differences. Thus, even if an order has been made by the Board, that Board has no authority to enforce it. No *legal* compulsion is placed upon a carrier to comply. The orders of the Board find their primary sanction in the collective economic bargaining power of the employees. Suit may be brought at any time within two years, thus affording ample opportunity for adjustment by agreement. If at the end of two years no action is brought the employees lose their right to file suit to enforce.

It is conceded that the option to bring or not bring suit is left in the hands of the employees. There is nothing illogical or unjust about this fact. After all, if an order of the Board is to be applied, the application must be made *by the carrier* as it, and it alone, has control over operating practices. If legal compulsion is sought, *it* is the only one upon whom that compulsion can be exercised. The situation is the same as that involved in reparations cases growing out of illegal rates for in such cases the only person who can make reparation is the one who has received the proceeds of the rates in question. The analogy between reparation and Adjustment Board cases is striking. It is not astonishing, therefore, to find the enforcement provisions of the Railway Labor Act in a large measure copied from other statutes relating to matters of reparation.

It is conceded, too, that Congress copied the provisions of the Interstate Commerce Act and of the Packers and Stockyards Act with the probable intent of mak-

ing resort to the Courts unattractive to the carriers. Certain advantages are given to the employees if and when the latter are compelled to take Court action. The choice of venue is theirs as the petitioner may sue "in the District Court of the United States for the district within which he resides, or in which is located the principal operating office of the carrier, or through which the carrier operates". Such a petitioner is not liable "for costs in the District Court, nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal". If the petitioner prevails he is to be allowed a "reasonable attorney's fee". (See Railway Labor Act, Sec. 3, First (p) copied in Appendix I.) These provisions obviously are designed to deprive the carrier of the practical advantages both geographical and financial, which it might otherwise enjoy in the defense of an action brought by one or more employees seeking to enforce a decision of the Adjustment Board.

Furthermore, it is provided in the Railway Labor Act that findings of fact made by the Board shall be accepted in the District Court as prima facie correct, a provision designed to shift the burden of proof in part at least, and thus deprive the carrier of certain of its procedural advantages as a defendant.

To recapitulate, the Congressional plan contemplates three factors:

(1) The necessity of providing a means for settling disputes arising out of the interpretation or application of collective agreements;

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(2) The adoption of bi-partisan Adjustment Boards as the sort of tribunals best adapted to this purpose, and

(3) The provision of a method of judicial review which shall be correlated with the purposes of, and the administrative processes set up by, the Railway Labor Act.

The plaintiff in the present case is the carrier. It comes into Court shortly after the promulgation of an order of the National Railroad Adjustment Board, and asks for a declaratory judgment which, in effect, will amount to a judicial review of this order. It needs little argument to demonstrate that the granting of such a judgment would completely disrupt the process of judicial review contemplated by the statute.

In the first place, the statute gives a two-year interval, between the effective date of the order and the time when suit must be brought, if at all, a time interval intentionally interposed for the purpose of giving further opportunity for the settlement of the controversy by negotiation. The statutory provision and purpose will be completely nullified if the carrier may immediately seek the review of an order of the Board through a declaratory judgment.

The statute seeks to equalize certain practical disadvantages which an employee may be under in seeking an enforcement. Accordingly it is provided that he may (within limits) select the District Court in which suit is to be brought. If defeated, he is not to be liable for

cost, save on his appeal, and if he wins, he is to receive reasonable attorney's fees. These rights are his as a matter of statutory law. There is no provision in the Declaratory Judgments Act which requires or authorizes the granting of similar advantages to the employees in this action. The issuance of a declaratory judgment here will therefore effectively deprive the employees of their statutory rights.

Finally, the findings of fact of the National Railroad Adjustment Board are accorded the effect of prima facie evidence in the statutory method of review. In this action they would have no such effect. The granting of a declaratory judgment would therefore effectively rob the Board's findings of the effect accorded to them by law. This Court is being asked to disregard and nullify a Congressional statute and to substitute for the method of judicial review there provided another method completely foreign to the Congressional intent.

The granting of declaratory judgments in cases of this kind will not only achieve a nullification of those provisions of the Railway Labor Act designed to provide for the enforcement and review of Adjustment Board orders, but will in addition seriously interfere with the operations of the Board itself.

It must be apparent that the facts upon which the plaintiff chiefly relies to support its prayer for a declaratory judgment are not peculiar to the plaintiff's situation. In every case where an order and award of the National Railroad Adjustment Board have been is-

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sued against a carrier, and the carrier does not comply, it finds itself in a position in all respects identical to that of the plaintiff here. In each of such cases the terms of a collective agreement have received an interpretation, an award has been made, an order has been issued directing the carrier to comply with the award, the employees insist upon compliance, and during the period intervening between the issuance of the order and the ultimate settlement of the dispute as a result of negotiations or suit, potential claims of employees based on the agreement as interpreted by the Board will accumulate. These features are common to every case.[1]

The point which we wish to bring home to the Court is that if the plaintiff is granted a declaratory judgment in this case there will be no basis for refusing to entertain a similar suit in any case where an order of the Board has been issued against any carrier. Not only would such a result completely eliminate from the law the review procedure provided therein, but it would have inequitable and undesirable effects upon the employees of the carriers generally and upon the Board itself.

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[1] It is of course true that the plaintiff in this action has alleged certain irregularities in the proceedings of the Board which would not necessarily be common to every action of this type. As we will point out in another section of the brief, however (on page 49), no court can have jurisdiction to declare an order of the Board invalid, without more, since such an order being unenforceable in itself, carries with it no threat of damage to the party against which it is directed. The only way whereby a plaintiff carrier could hope to state a cause of action would be to seek relief in addition to the mere invalidating of the Board's order, i. e., a reinterpretation of the Collective Agreement in question, and a declaration of rights thereunder. In every case such request would have to be based on the same general contentions, as pointed out in the text.

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While either carriers or employees are free to take disputes before the National Railroad Adjustment Board, most, if not all, of the disputes which reach that tribunal are taken there either by ex parte action of the employees or by joint submissions of both parties prepared at the request of the employees. It is not difficult to understand why this should be so. The carrier's theory as to the proper interpretation or application of the agreement involved in any case is always the one which is being applied, for the carrier is the one which applies such an agreement. The carrier, therefore, would have nothing to gain by instituting a proceeding to test the propriety of a practice which is already in force, and with which it is in thorough agreement.

An examination of the terms of the Railway Labor Act will reveal that *no right of appeal is given to the employees if they lose their case before the Board.* Inasmuch as they are the parties who ordinarily invoke the services of the Board under that statute they are precluded from attacking the terms of the Act in this regard or from seeking any right to review under general rules of law.[1]

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[1] *Cf.* **Minds vs. Penna. R. R. Co.**, 237 Fed. 267, where the Court held that a shipper invoking the jurisdiction of the Interstate Commerce Commission to pass upon his reparations claims is finally concluded an adverse action of the Commission, and cannot thereafter resort to the courts. We have already called to the Court's attention the fact that the provisions for the enforcement and review of the orders of the Adjustment Board are the same as those provided for reparations orders of the Interstate Commerce Commission.

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Thus under the statute the carrier already has an advantage before the Board. If it wins, the decision in its favor is final; if it loses, the decision against it is interlocutory only, and it may still test out its legal rights in Court action which must be brought against it by the employees if the decision is to be enforced. The procedural and evidentiary disadvantages which the Act places upon the carrier in such an action are merely compensation for the advantages it enjoys before the Board.

If the practice is established of entertaining suits by carriers for declaratory judgments immediately after the entering of an order of the Board, the carriers will have a tremendous additional advantage. If a carrier wins before the Board, the result will not even be interlocutory, but will be an absolute nullity, for the carrier can immediately invoke the jurisdiction of the courts to retry the whole controversy de novo without even subjecting itself to the procedural disadvantages imposed upon it by the Act. Under such a system the employees would go before the Board with everything to lose and absolutely nothing to gain. It can hardly be doubted that the result would be an increasing unwillingness on the part of the employees to submit disputes to the Board and an increasing resort by them to the familiar weapons of industrial warfare as a means of securing adjustments of their disputes. Thus the Board's usefulness as an administrative agency would to a large measure be ended.

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We desire that the Court should know the practical operation of the system provided by the Railway Labor Act for the adjustment of disputes—a system which the Court is being asked to disrupt. In the Fourth Annual Report of the National Mediation Board on page 5 we find this statement: "There were no instances during the course of the year (June 30, 1937, to June 30, 1938) on the railroads and air lines of employees leaving the service for strike purposes." This is a relatively calm statement of the startling and significant fact that *not a single employee of any American Railroad lost a single hour's time during the year mentioned on account of a strike.* We confidently assert that this is a record which cannot even be approached by any other American industry. The part played by the National Railroad Adjustment Board in achieving this result is shown by the statistics in its report attached as an appendix to the Report of the National Mediation Board above mentioned. From this report it appears that during the year in question the Board adjusted more than 1,600 *separate disputes,* thereby eliminating 1,600 *potential sources of labor strife.* Whatever may be said of the system provided by the Railway Labor Act, the inescapable fact is that *it works.*

In summary, therefore, in this connection, the rule of law is clear to the effect that a declaratory judgment will not be granted as a substitute for a procedure prescribed by statute for the type of case in question. It is equally clear that the plaintiff proposes just such a

substitution of remedies; a substitution whose inevitable effect will be the complete disruption of the whole procedure of the Railway Labor Act, a procedure which was instituted to accomplish, and which *is accomplishing*, a vital public purpose. Certainly the Declaratory Judgments Act was not designed as a means to provide for the bringing about of such results.

II. A Declaratory Judgment Will Not Be Granted as a Means of Reviewing the Decision of Another Tribunal.

The Declaratory Judgments Act is not an appellate statute. Its purpose is to provide a forum for the adjudication of controversies which otherwise could not be passed upon at the time when the action is brought. It is not designed to provide a new means for the redecision of *decided issues* where another forum is open and its processes have already been employed.

The Federal Declaratory Judgments Act (U. S. C. Title 28, Article 400, Paragraph I) provides that:

> "In cases of *actual controversy* * * * the courts of the United States shall have power * * * to declare rights and other legal relations * * *".

Where the statute refers to "actual controversy" it obviously refers to untried controversies, not those upon which decisions have already been rendered.

This position is supported by abundant authority. Professor Borchard in his work on Declaratory Judgments, page 181, states:

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"The declaratory action is not a substitute for a new trial, or an appeal from a former judgment deciding identical issues, or issues which the court believes were passed upon."

In American Jurisprudence, Vol. 16, pages 295 and 296 in the article on Declaratory Judgments, we find the following:

"Questions already adjudicated by a court having jurisdiction of the subject matter and the parties cannot thereafter be the subject, between such parties and their privies, of an actual controversy within the meaning of this term in the Declaratory Judgments Act. The act is not intended to be used to elucidate or interpret judicial decrees or judgments already entered or to modify or declare rights thereunder. Hence, a declaratory judgment proceeding is not an appropriate method of obtaining the vacation of a judgment; and it would be entirely beyond the purpose and scope of the statute as well as contrary to fundamental principles for a court to attempt, in such a proceeding, to review and determine the validity of a judgment of a court of coordinate jurisdiction."

The Court of Appeals of the State of Kentucky had this problem before it in the case of *Back's Guardian vs. Bardo*, 234 Ky. 211; 27 S. W. (2d), 260, decided in 1930. An action had been filed by an Executor to sell certain real estate, to secure an order construing a will and for partition, in which action a judgment had been rendered granting the relief prayed for. Subsequently, some doubt

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was expressed as to the regularity of the proceedings in the action above mentioned, and this suit was brought under the Declaratory Judgments Act propounding to the Court certain questions relating to the "construction of the will and the regularity of the partition proceedings in the prior action brought for that purpose, and to the proper distribution of the estate". The Court refused the relief requested and made the following statement:

> "Were we to hold that a proceeding under the Declaratory Judgments Act would lie for the purpose of determining whether a prior judgment in an action or proceeding between the same parties was proper, or the proceedings leading up to the judgment were regular, it would result in ignoring the prior judgment and in depriving the parties of the right of appeal within the time prescribed by the Code. *The purpose of the Declaratory Judgments Act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated.* In other words, it was never intended as a *substitute for a new trial,* or other steps that the Code requires to be taken in the same action, or for *an appeal to this Court.* In the circumstances, the Court below should have dismissed the proceeding and not have proceeded to adjudicate the rights of the parties."
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> (Emphasis supplied.)

See also *Ferree vs. Ferree,* 273 Ky. 238, 115 S. W. (2d) 1055, and *Grooms vs. Grooms,* 225 Ky. 228, 7 S. W. (2d) 863.

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In the case of *Kings County Trust Company vs. Melville,* 216 N. Y. Supp. 278, the Court held that the Declaratory Judgments Statute of New York did not confer jurisdiction upon a court to adjudicate a controversy already passed upon by a court of concurrent jurisdiction. This was considered as "in effect" asking the Court "to act in the capacity of an appellate court". The Court held that such procedure is contrary to fundamental principles, and is entirely beyond the purpose and scope of the provision authorizing declaratory judgments.

See also:

The same effect *Haan vs. Haan,* 231 N. Y. Sup., page 58.

In the case of *Central High School Athletic Association vs. City of Grand Rapids,* 274 Mich. 147, 264 N. W. 322, the Court declined to issue a declaratory judgment overturning a decision of the City Zoning Commission, whose decisions on the facts were made final by the ordinance.

It is thus established that where a controversy has once been decided by a tribunal having jurisdiction over it, it can no longer be considered a pending or "actual" controversy within the meaning of the Declaratory Judgments Act, whether the tribunal exercising original jurisdiction was administrative or judicial. It is, of course, true that while a decision of the National Railroad Adjustment Board is made "final" by statute, the order of the Board is not directly enforceable by process. This fact, however, does not militate against the opera-

tion of the above stated rule of law. The order of the Board, while not enforceable as such, still embodies a *decision* regarding the positions of the parties. Such an order might itself be termed a declaratory judgment of the Board, depending for its ultimate enforcement upon its being maintained in a court of law.

As we have seen, the purpose of the Declaratory Judgments Act is to provide a means whereby, in cases of actual controversy, a party who is in honest doubt as to his rights may have them adjudicated before committing overt acts which might result in the violation of the rights of others and in the imposition upon him of a liability for damages. In the present case there is no basis for any real uncertainty on the part of the plaintiff. Its rights and those of the defendants have already been established by a tribunal having statutory jurisdiction to decide them. Any uncertainty which may exist in the mind of the plaintiff is self-created. It arises, not out of the absence of a decision on the question, but out of its own unwillingness to accept and apply a decision already made. The Declaratory Judgments Act was not intended to afford relief in such circumstances.

III. A Declaratory Judgment Passing Upon the Validity of an Administrative Order Will Not Be Granted Where the Plaintiff is Not Imperiled by the Order.

In the foregoing sections of this brief we have established that the Declaratory Judgments Act does not provide a means for the review of a decision made by

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another tribunal, and in particular that the Act cannot be invoked as a substitute for procedure specifically established by statute for the case at hand. There is yet another reason, however, why this Court is without jurisdiction to declare the order of the Board invalid through a declaratory judgment. This reason grows out of the fact that there is inherent in the order no threat of damage to the plaintiff.

That a contract, statute or other subject matter of an action must actively imperil the plaintiff before he can seek relief through declaratory judgment is well established.

> ". . The law created no new substantive rights or legal relationships but added to the remedies previously existing, an additional one for relief in the form of a judgment declaring, in cases of actual controversy, the rights of the parties. Though such relief was inherent in some situations previously, the statute extended the propriety of the procedure greatly, with the obvious intent to avoid delay and *accrual of damages* against one uncertain of his rights and to promote an early adjudication of the controversy between the parties without waiting until one of them should see fit to begin suit for coercive relief after damages had accrued."
>
> *Davis* v. *American Foundry Equipment Co.*, 94 Fed. (2d) 441.
>
> (Emphasis supplied.)

"It was the congressional intent to avoid accrual of avoidable *damages* to one not certain of

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his rights and to afford him an early adjudication without waiting until his adversary would see fit to begin suit, after damage had accrued."

E. Edelmann & Co. v. Triple-A Specialty Co., 88 Fed. (2d) 852.

(Emphasis supplied.)

With what damage is the plaintiff threatened by the Board's order? In other words, what justiciable controversy as to the validity of the order is presented by the complaint?

It is true that in Paragraph 4 of the complaint the plaintiff alleges in terms that "an actual controversy exists * * * said controversy having resulted from a purported award of the National Railroad Adjustment Board, First Division". This statement, however, must be considered in connection with the other allegations of the complaint, and when so considered it is apparent that it is a mere conclusion of the pleader not supported by allegations of fact, and hence not admitted to be true for the purposes of this phase of this proceeding. In order to establish the correctness of the last assertion, it is but necessary to turn to the complaint and examine it in order to ascertain the nature of the peril or threat of damages which the plaintiff alleges as the basis of its action. That peril arises solely out of the various claims for compensation made by the various defendants (see Paragraph 29 of the complaint, page 10). These claims, however, are *based upon the Agreement of* 1923 *—not upon the order of the Board.*

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It is true that the Agreement in question was interpreted by the order of the Board in accordance with the contentions of the defendants as to its meaning. Their present claims, however, are not based upon the order because the order is in itself *unenforceable*. It may be "enforced", if at all, only through a court action. An examination of the "enforcement" provisions of the Railway Labor Act will reveal fully the legal effect of the order of the Board. We have already considered these provisions in another connection, and have noted that the only legal effects attached to an order of the Board, when before a court for enforcement, are evidentiary or procedural effects—not substantive ones; e. g., findings of fact contained therein are prima facie correct. The existence of the order is also important in fixing costs and attorneys' fees. Otherwise than as above noted, an action to "enforce" an order of the Adjustment Board proceeds exactly as if there were no order. The plaintiff files "a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises". The action proceeds "in all respects as other civil suits" (with the exceptions above noted) and the Court enters "such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board". (Quotations are from Section 3, p. of the Railway Labor Act, see Appendix I.)

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Although the statute speaks of the action as one to enforce an order of the Board, and although the procurring of such an order is undoubtedly a prerequisite to the use of the statutory procedure, it is apparent that the mere existence of the order in no sense establishes that the plaintiff in such a suit has a cause of action. He must plead more than the order. He must prove more, and a judgment of enforcement by no means follows as a matter of course from the order's issuance. His cause of action before the Court is dependent upon the agreement, out of the interpretation of which, the alleged dispute arose. The existence of the order of the Board merely assists him in preparing and proving that cause of action.

It follows, therefore, that when the individual defendants presented to the plaintiff, individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order which has no substantive effect and is in itself unenforceable.

Accordingly the plaintiff has failed to show how the existence of the Board's order effects its legal rights in any way. The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued. If this Court should, without more, grant a declaratory judgment holding the order of the Board invalid, the plaintiff would still be in the same position in this regard.

The fact that persons have presented claims of right under an agreement might, in a proper case, have con-

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siderable bearing on the question as to whether the Court should by declaration interpret that agreement, but it cannot afford justification to the Court to interpret any and all other documents, orders, etc., which may in some manner be connected with the subject matter. The collective agreement of 1923, and the order of the National Railroad Adjustment Board are two separate and distinct entities. The fact that uncertainty or peril may arise from one cannot empower the Court to make a declaration as to the other.

Plaintiff has failed to show that there exists any claim against it, based on the order of the Board, or that there exists any uncertainty as to its rights under that order (for the reason that the order establishes no rights). It follows that as to this item of relief the plaintiff has failed to bring itself within the purview of the Declaratory Judgments Act.

IV. The Railway Labor Act Does Not Vest Judicial Power in The National Railroad Adjustment Board.

The plaintiff asserts that the Railway Labor Act seeks to vest judicial power in the National Railroad Adjustment Board, an administrative agency, and that hence both the statute and the order of the Board made thereunder are invalid.

Article III, Section 1 of the Constitution of the United States, provides that "the judicial Power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time

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to time ordain and establish". A number of courts and commentators have sought to state general definitions of this phrase and of kindred expressions. Thus in Volume 14 of American Jurisprudence, page 364, we find the following statement:

> "Judicial power is that which adjudicates upon and protects the rights and interests of individual citizens and to that end construes and applies the law. It means power to hear, to determine, and to enforce. It has also been defined as the power to entertain a suit, consider the merits—that is, the various elements which enter into and qualify the plaintiff's rights to the relief sought—and render a binding decision thereon."

In discussing the "jurisdiction" of the Federal Courts under Article III the Supreme Court of the United States stated in an early case:

> "Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extra-judicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the Court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it."
>
> *The State of Rhode Island v. the State of Massachusetts*, 12 Peters (U. S.) page 657 at 718.

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See further in this connection, *General Investment Company v. New York Central Railroad Company*, 271 U. S. 228 at page 230.

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought."

In distinguishing between the legislative and judicial functions of the Government, the Supreme Court stated in the case of *Prentis v. Atlantic Coast Line Company*, 211 U. S. page 210, at page 226, that:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."

The Supreme Court of Arizona in the case of *Stuart v. Norviel*, 26 Ariz. 493, has said:

> "Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."

Authorities might be multiplied along these lines, but we believe that enough has been said to establish that in general judicial power includes, first, the power to pass upon issues in controversy, and, second, the power to render a binding judgment in relation thereto.

It is at once apparent that as to the second of these qualifications the power of the National Railroad Adjustment Board is certainly not judicial, inasmuch as

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its orders lack binding effect and cannot be "enforced", save through a regular action in the courts. The situation in regard to the orders of this Board is strikingly similar to that considered by the Supreme Court of Montana in the case of *Shea v. North-Butte Mining Company*, 55 Mont. 522, 179 Pac. 499. In this case the Court was confronted by the contention that the Workmen's Compensation Act of the state vested judicial power in the Industrial Accident Board. The Court rejected this contention saying:

> "It is true that many of the functions exercised by the Board are judicial in character; but that it is not vested with judicial power in the sense in which that expression is used in the Constitution becomes clear upon a moment's consideration. As used in the Constitution, the expression 'judicial power' means the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. Miller on the Constitution, 314. This power the Board does not possess. It was created as a purely administrative body. It may hear evidence to enable it to make an award in a particular case, and to that end may call witnesses; but *it is without power to render an enforceable judgment*, and its determinations and awards are not enforceable by execution or by other process *until a judgment has been entered therein on appeal to a regularly constituted court.*"
>
> (Emphasis supplied.)

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In a case involving a similar statute the Supreme Court of the State of Missouri in the case of *Oren v. Swift & Company*, 51 S. W. (2d) 59, said:

> "We do not consider the Commission a Court, and we have held that the Compensation Act does not vest it with judicial power in a constitutional sense (citations omitted). It has no power to authoritatively expound any principle of law or equity, or to *enforce its orders. Its awards are not enforceable by execution or other process until judgment is entered thereon in the Circuit Court.*"
>
> (Emphasis supplied.)

Thus it is apparent at the outset that one of the essential attributes of "judicial power", i.e., the authority to render a binding judgment or decree, is not possessed by the national Railroad Adjustment Board.

Referring back, however, to the first of the indicia of "judicial power" above noted, i. e., "the power to pass upon issues in controversy", it is clear that here is a broad statement of the law which, while in the main correct, cannot be considered as controlling in every situation. While judicial power is undoubtedly the power to pass upon issues in controversy, it by no means follows that every power to pass upon such issues must necessarily be held to be "judicial" within the meaning of the Constitution. There are many instances where such power has been vested in administrative agencies without violating the constitutional restriction.

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"Many, if not most, executive and administrative officers are called upon to make determination of facts in the performance of their official duties, and to apply the law as they construe it to the facts so found. In so doing they do not exercise 'judicial power', as that phrase is used in the Federal Constitution and laws."

Tracy v. Commissioner of Internal Revenue, 53 Fed. (2d) 575 at page 578.

We do not understand that the plaintiff questions this practice so long as the issues involved arise between a private party and some agency of government. It is contended, however, that where two private parties are involved in a controversy relative to their present rights and duties the power to decide that controversy is necessarily a judicial power which may be vested only in the Courts (See paragraph 31 (d) of the complaint, page 11).

The plaintiff's contention in this regard is too broad, however, and fails to find support in the authorities. While it must be concluded that the decision of controversies between private citizens is ordinarily the function of the Courts, it is well recognized that the power to render such decisions may be vested in administrative bodies where, (1) cases of the type in question will probably be so numerous as to over-burden the judicial system, or are otherwise of such a nature as to be inappropriate for decision by judicial procedure, and (2) the decision of pending issues between parties is incidental

to a larger purpose, legislative or administrative in nature.

The first of these exceptions includes cases under the Workmen's Compensation Acts. These Acts ordinarily confer upon administrative agencies jurisdiction to pass upon all questions arising under the statutes, whether of fact or of law. Where a self-insurer is involved, the case is one between private parties, yet the Courts have concluded that there is no vesting of judicial power in an administrative agency such as to violate the constitutional provisions.

Alabam's Freight Co. v. Hunt, 29 Ariz. 491.

Oren v. Swift & Co., supra.

Shea v. North-Butte Mining Co., supra.

Wheeling Corrugating Co. v. McManigal, 41 Fed. (2d) 593.

Crowell v. Benson, 285 U. S. 22.

In the case last above cited the Supreme Court of the United States said:

> "For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus *relieving the courts of a most serious burden* while preserving their complete authority to insure the proper application of the law."
>
> (Emphasis supplied.)

In this connection we direct the Court's attention to the annual reports of the National Railroad Adjust-

ment Board attached as appendices to the annual reports of the National Mediation Board. It appears from these reports that there have been docketed with the National Railroad Adjustment Board during the period beginning at its establishment and ending on June 30, 1938, a total of 7,109 cases; 3,891 cases have been heard and 4,247 cases decided. Of this total the First Division alone has docketed 6,080 cases, has heard 3,078 and has decided 3,329. If it should be held that all of these cases are of such a nature that they are fitted only for determination by the courts, it is apparent that the judiciary would be under an insuperable burden of litigation.

Furthermore, the Courts have sanctioned the submission of controversies between private parties to administrative bodies where the making of the decision is incident to and in furtherance of a broad legislative plan. Reparations cases are in this category. Where an unreasonable or discriminatory rate has been charged a shipper he may "sue" the carrier for reparation before the Interstate Commerce Commission. Such an action is between private parties and the issues raised are essentially the same as would be present in an ordinary action for damages.

Yet it has been held that the decision of individual controversies involving reparations is only an incident of the Commission's administrative function to provide for reasonable and uniform rates in the future. Accordingly no "judicial power" is said to be vested in the Commission.

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In the case of *Southern Railway Company* v. *Eichler*, 56 Fed. (2d) 1010, a reparations proceeding before the Commission turned on the interpretation to be given to a tariff published by the carrier. The carrier contended that such an issue was outside the jurisdiction of the Commission. The Court rejected this contention, saying:

> "In this view, the question at issue resolved itself into one of law, requiring the construction of a tariff, and appellant urges that this is a question for the Court alone, and not one within the jurisdiction of an administrative body. While it may freely be admitted that the submission of pure questions of law, to a body in which the rules of evidence are relaxed, and the hearing assumes an informal character, must necessarily be less satisfactory, nevertheless, the jurisdiction of the Commission to entertain the complaint of any person claiming to be damaged by any common carrier subject to liability under the provisions of the Interstate Commerce Act has been broadly conferred by the Congress (Section 9, 49 USCA p. 328), and this jurisdiction has been consistently recognized.
>
> (Citations omitted.)
>
> "If an order for reparation is made by the Commission, it can be enforced only by suit in some court of general jurisdiction. Section 16, 49 USCA p. 6. Thus the constitutional provisions guaranteeing trial by jury and due process of law (Const. U. S. Amendments 7 and 14) are satisfied."

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The same conclusion has been reached regarding a reparations order of the Secretary of Agriculture made pursuant to the provisions of the Packers and Stockyards Act. The case of *Sullivan* v. *Union Stockyards Company*, 26 Fed. (2d) 60, involved the question of whether preliminary resort must be had to the administrative agency as a prerequisite to court action. The precise issue adjudicated is shown from the following excerpt from the opinion of the Court:

> "The Packers and Stockyards Act is patterned upon the Act to Regulate Commerce, and the plaintiff concedes the applicability to this case of the rule recognized by this Court in *Chicago, B. & Q. R. Co. v. Merriam & Millard Co.*, 297 F. 1, and *Famechon Co. v. Northern Pacific R. Co.*, 23 F. (2d) 307, to the effect that, in cases arising under that Act, preliminary resort must first be had to the Interstate Commerce Commission, and the right to reparation fixed, before suit may may be successfully maintained in the courts.
>
> "It is claimed, however, that such an interpretation of the Packers and Stockyards Act and of the Act to Regulate Commerce renders them unconstitutional, because it gives to the Secretary of Agriculture, in the one instance, and to the Interstate Commerce Commission, in the other, judicial powers. No case is cited in the plaintiff's brief which has any bearing on the specific question. He refers to the general proposition that executive, legislative and judicial functions shall be kept separate, and that persons intrusted with power in any one of these three branches shall

not be permitted to encroach upon the powers confided to others. About this, of course, there is no dispute. He cites *Interstate Commerce Comm. v. Brimson,* 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047, in which it was held that the Commission could not be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment, on the ground that 'the power to impose fines or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises'. There is a vast and obvious distinction between the power to order a man to jail and the power to determine from evidence whether a right to reparation exists because of a discriminatory charge.

"That the Interstate Commerce Commission possesses certain quasi judicial power has long been recognized by the Supreme Court, without perturbation."

The Court decided the case as follows:

"An order of the Secretary of Agriculture, determining that a rate is unreasonable or discriminatory and awarding reparation, is a quasi judicial order."

A consideration of the provisions of the Railway Labor Act as a whole will show that the jurisdiction conferred upon the National Railroad Adjustment Board was not so conferred for the purpose of segregating a certain type of cases merely in order to provide a separate form for their determination. The segregation is

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a part of a legislative plan designed to operate in the future in the insuring of a condition of industrial peace on the railroads.

In an earlier portion of this brief we have already sketched for the Court the organization and history of the National Railroad Adjustment Board. We have seen that its legal antecedents were all administrative rather than judicial in character. We have seen that its own organization is not that of a non-partisan judicial tribunal, but of a bi-partisan conference group. Its function is to adjust, to compromise, to settle, rather than to judge the disputes which come before it.

In short, the National Railroad Adjustment Board was formed to further a legislative purpose. This fact is clearly revealed by the provisions of the Railway Labor Act and the reasons stated by Congress for the adoption of this statute. In the first place, referring again to the provisions of Section 3, Paragraph First (i) (quoted in Appendix I hereof) we find that the cases coming before the tribunal are "*disputes* * * * *growing out of* grievances, or out of the interpretation or application of agreements * * * ". The exact language of the statute is important in this connection as is also the reason for its adoption.

Both parties to a collective agreement participate in its execution. Only one of them, however, the employer, is primarily responsible for its interpretation or application. This conclusion arises out of the control of operating policies which is necessarily in the em-

ployer's hands. In the carrying out of that control it must necessarily, in the first instance, interpret and apply its collective agreement with its employees. If the interpretation or application so made is unsatisfactory to the employees, a dispute arises. Such a dispute, if not adjusted by the parties, may eventually find its way to the National Railroad Adjustment Board. Thus, it will be seen that the subject matter upon which the Board is called to exercise its jurisdiction is the "dispute", not the "interpretation" of the agreement. The "interpretation" to which the statute refers was the one *made by the carrier* and was the act which *caused* the dispute. Under the words of the statute, therefore, the jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement. The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.

The function of a court is to render a judgment between parties who are before it as litigants. Such a judgment has the effect of establishing the parties' present rights. With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary. It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are

not conducive to the establishment of cordial relationships between the parties in the future.

In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption.

That such is the purpose of the Railway Labor Act there can be no doubt. The language of the Act itself is unambiguous. The provisions of Section 3 give no direction to the National Railroad Adjustment Board as to the nature of its decision, save to say that it shall make an "award"—a word borrowed from the language of arbitration. Section 1 of the statute under the heading "General purposes" gives us further light as to the nature of the Board's decisions when it says: "The purposes of the Act are; * * * (5) To provide for the prompt and *orderly settlement* of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions".

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That the intention of the framers of the Act was to provide a tribunal which would settle such disputes in a manner conducive to future peaceable relationships between the parties is shown by the language of the report of the Committee of the House of Representatives on Interstate and Foreign Commerce which was made at the time when the passage of this Act was recommended. The language of this report is as follows:

> "The *major purpose* of the bill is to provide *sufficient and effective* means for the settlement of minor disputes known as grievances, which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions * * *. Unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of *strike ballots* and *threatened to interrupt interstate commerce in order to secure an adjustment.* This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected *in the interests of industrial peace and of uninterrupted transportation service.* This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties."
>
> (Emphasis supplied.)

It will be remembered that the United States Railroad Labor Board, created by the Transportation Act

of 1920, possessed among its other powers jurisdiction to consider disputes growing out of grievances or out of the interpretation or application of agreements in the event that regional boards of adjustment were unable to agree upon awards. In characterizing the general jurisdiction of this Board the Supreme Court of the United States in the case of *Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U. S. 72, at page 84, made the following statement:

> "But title III was not enacted to provide a tribunal to determine what were the *legal rights and obligations* of railway employers and employees, or to *enforce or protect them. Courts can do that.* The Labor Board was created to decide how the parties *ought* to exercise their legal rights so as to enable them to *co-operate* in running the railroad. It was to reach a *fair compromise* between the parties, *without regard to the legal rights* upon which each side might insist in a court of law."
>
> (Emphasis supplied.)

Thus the language of the Railway Labor Act, the report of the Congressional Committee in recommending its passage, and the language of the Supreme Court in pointing out the jurisdiction of a similar board all reveal that the function of the National Railroad Adjustment Board is basically administrative. The interpretations which it makes of existing agreements are not ends in themselves, but are merely the means by which a continuing legislative purpose is to be effectuated.

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That purpose is the preservation of interstate commerce from interruptions due to labor disputes and the guarding of the public from the harm which such disputes may cause.

In summary, therefore, we have shown that by general definition "judicial power" includes the power to enter binding decrees and orders, a power not possessed by the National Railroad Adjustment Board. We have shown that the constitutional requirement that judicial power be vested only in courts is not an inflexible rule to the effect that all decisions judicial in nature must be rendered by a court. In many situations such matters have been, and essentially must be, entrusted to administrative agencies if government is to continue to function. The mere fact that the parties to a given controversy are private parties seeking to enforce private rights, the one against the other, will not preclude the vesting of jurisdiction over that controversy in an administrative agency. We have seen further that the Courts have been inclined to look with favor upon legislation giving to administrative tribunals jurisdiction over cases which would otherwise unduly burden judicial tribunals, or where the decision of individual controversies is purely incidental to a wider legislative purpose. An application of these principles to the Railway Labor Act shows conclusively that that statute vests no judicial power in the National Railroad Adjustment Board, and hence that it conforms in all respects to Article III of the Constitution of the United States.

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No Cause of Action of Any Kind is Stated by the Complaint.

The plaintiff having failed to establish a cause of action for declaratory judgment, it is apparent that the whole complaint must fall for no other cause of action is stated.

Clearly, the plaintiff has made out no claim for money damages at law; likewise no facts are stated which bring the case within the general equity jurisdiction of the Court.

The gist of an action in equity is a wrongful act committed or threatened by the defendant, or a failure on his part to act where there exists a positive legal duty to do so. Either one of these factors, when coupled with a threat of irreparable injury to the plaintiff for which he has no adequate remedy at law, will justify the interposition of a court of equity.

There is no showing in this case that the defendants have failed to perform any legal duty owed by them to the plaintiff. Similarly, it does not appear that any wrongful act has been committed or is threatened by them. The only acts of which they are accused in the complaint are the filing of certain claims with the plaintiff. These claims are for compensation in the nature of damages for breach of contract. Equity jurisdiction has never been held to extend to the enjoining of the filing of claims by one party against another. Especially is this true where the claims filed are merely claims for

money which may be litigated in an action at law, or, as here, through a specified statutory procedure.

Thus it follows that, since relief is not available to the plaintiff through a declaratory judgment, and it has failed to show any basis for general equity relief, the complaint fails to state any cause of action.

CONCLUSION.

In conclusion, therefore, the complaint on its face fails to establish a cause of action justifying the granting of the relief sought.

I. Because a Declaratory Judgment will not be granted as a substitute for another remedy prescribed by statute for the particular type of case.

As we have seen such other remedy is provided by the terms of the Railway Labor Act. The granting of a declaratory judgment in this action would nullify the statute in this connection and disregard the plain intent of Congress. Furthermore, if a declaratory judgment is to be made available to the plaintiff and to other carriers similarly situated, the result will be the disruption of the whole administrative process established by the Act.

II. Because a Declaratory Judgment will not be granted as a means of reviewing the decision or another tribunal.

The controversy between the parties to this case has already been decided by the National Railroad Adjustment Board. The procedure authorized by the

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Declaratory Judgments Act was designed as a means of deciding otherwise undecided issues—not as a procedure for appeal or review.

III. Because a Declaratory Judgment passing upon the validity of an administrative order will not be granted where the plaintiff is not imperiled by the order.

Insofar as the validity of the order of the National Railroad Adjustment Board is concerned, the Court is without jurisdiction to pass upon the question. The order being in itself unenforceable, no right of the plaintiff can be jeopardized thereby. As to this feature of the case, therefore, the Court is being asked for an academic opinion of the law—not for a decision of an "actual controversy" as provided in the Declaratory Judgments Act.

IV. Because the Railway Labor Act does not vest judicial power in the National Railroad Adjustment Board.

Although the Railway Labor Act vests in the National Railroad Adjustment Board jurisdiction to pass upon rights of and issues pending between private parties, the power so conferred is not a judicial power in the constitutional sense. The number of disputes designed to be passed upon and which are being passed upon by this Board is so vast that to require them to go through the courts would place an unreasonable burden upon the judiciary. Furthermore, the provisions of this Act which set up this separate forum for this type of

case are only incidental to the broad regulatory purposes of the statute.

Accordingly it follows that the complaint has failed to state a cause of action for declaratory judgment. This being true, and there being no allegations in the complaint justifying the Court in granting equitable relief, the complaint fails to state a cause of action of any kind.

Respectfully submitted,

Frank L. Mulholland,
1041 Nicholas Bldg.,
Toledo, Ohio.

Clarence M. Mulholland,
1041 Nicholas Bldg.,
Toledo, Ohio.

Willard H. McEwen,
1041 Nicholas Bldg.,
Toledo, Ohio.

Harold C. Heiss,
Keith Bldg.,
Cleveland, Ohio.

Russell B. Day,
Keith Bldg.,
Cleveland, Ohio.

William E. Willias,
Kellogg Bldg.,
Washington, D. C.
Attorneys for Defendants.

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APPENDIX I.

EXCERPTS FROM RAILWAY LABOR ACT AS AMENDED JUNE 21, 1934. (U. S. C. TITLE 45, CHAPTER 8.)

GENERAL PURPOSES OF THE ACT

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. (U. S. C. Title 45, Section 151 a.)

NATIONAL RAILROAD ADJUSTMENT BOARD

Establishment and Members.

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

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"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act. (U. S. C., Title 45, Sec. 153, Paragraph First (a).)

Divisions.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated oy the carriers and five of whom shall be selected and designated by the national labor organizations of the employees. (U. S. C. Title 45, Sec. 153, First (h).)

Jurisdiction.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating

officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (U. S. C. Title 45, 153 First (i).)

Neutral Referee.

"(1) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees. (U. S. C. Title 45, 153 First (1).)

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Publication and Effect of Awards.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute." (U. S. C. Title 45, 153 First (m).)

Majority Necessary to Make Award.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it." (U. S. C. Title 45, 153 First (n).)

Orders Directed to Carriers to Apply Awards.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named." (U. S. C. Title 45, 153 First (o).)

Enforcement and Reviews of Orders.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time

limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (U. S. C. Title 45, 153 First (p).)

Limitation of Actions.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the

time the cause of action accrues under the award of the division of the Adjustment Board, and not after." (U. S. C. Title 45, 153 First (q).)

Annual Reports.

"(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers." (U. S. C. Title 45, 153 First (v).)

LOCAL AND SYSTEM ADJUSTMENT BOARDS MAY BE ESTABLISHED.

"Sec. 3. Paragraph Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment

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of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board." (U. S. C. Title 45, Sec. 153, Paragraph Second.)

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APPENDIX II.

EXCERPTS FROM MEMORANDUM OF UNDERSTANDING INCORPORATED IN GENERAL ORDER 13 OF THE FEDERAL DIRECTOR-GENERAL OF RAILROADS ISSUED MARCH 22, 1918.

"*It is understood,* That *all controversies growing out of the interpretation or application of* the provisions of the wage schedule or *agreements which are not promptly adjusted by the officials and the employees* on any one of the railroads operated by the Government shall be disposed of in the following manner:

"1. There shall be at once created a commission, to be known as Railway Board of Adjustment No. 1, to consist of eight members, four to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the four organizations of employees hereinbefore named and compensated by such organizations.

"8. The board question of wages and hours will be considered by the Railroad Wage Commission, but *matters of controversies arising from interpretations of wage agreements,* not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 1, when properly presented to it.

"10. Personal *grievances or controversies arising under interpretation of wage agreements, and all other disputes* arising between officials of a railroad and its employees, covered by this understanding, *will be han-*

dled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or someone officially designated by him), *when, if an agreement is not reached,* the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned *shall refer the matter, with all supporting papers,* to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

"12. In hearings before the Railway Board of Adjustment No. 1, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the chief executive officer of the organization concerned.

"14. In each case an effort should be made to present a joint concrete statement of facts as to any controversies, but the board is fully authorized to require

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information in addition to the concrete statement of facts, and may call upon the chief operating officer of the railroad or the chief executive officer of the organization concerned for additional evidence, either oral or written.

"15. *All decisions of the Railway Board of Adjustment No. 1 shall be approved by a majority vote of all members of the board.*

"16. After a matter has been considered by the board, and *in the event a majority vote can not be obtained, then any four members of the board may elect to refer the matter upon which no decision has been reached to the Director-General of Railroads for a final decision.*"

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APPENDIX III.

EXCERPTS FROM AGREEMENT ESTABLISHING SOUTHEASTERN REGIONAL BOARD OF ADJUSTMENT UNDER THE PROVISIONS OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

"(1) That *all disputes growing out of personal grievances or out of the interpretation or application of the schedules, agreements or practices* now, or hereafter established on the railroads signatory hereto, *which cannot be adjusted by direct conference between representatives of the individual railroad and its respective employees,* shall be disposed of in the following manner:

"(2) There shall be created as soon as practicable a Railroad Board of Adjustment to be known as 'Train Service Board of Adjustment for the Southeastern Region' (hereinafter referred to as the Board), to consist of *eight members; four to be selected by the said railroads, and one each by the chief executive officer of each of the four organizations of employees,* hereinbefore named.

"(7) The Board shall render decisions on all matters in dispute, as provided in Section 1 and 8 hereof, and when properly submitted to the Board.

"(8) *Disputes* arising between a railroad and its employees covered by this agreement *will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad* (or someone officially designated by

him), when, if an agreement is not reached, the Chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall *refer the matter, with all supporting papers, to the Board,* which Board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned, of the time set for hearing.

"*In the event that either party to a dispute declines to become a party to a joint submission, as above provided, then either party may refer the dispute to the Board under such regulations as the Board may prescribed.*

"On a written petition signed by not less than one hundred unorganized employees of the classes covered by this agreement, directly interested in the dispute, the Board shall hear and decide any dispute covered by this agreement; provided, that no dispute over an interpretation of an existing agreement, rule or practice which has been agreed to or accepted by the management and the duly constituted committee representing the employees parties thereto, shall be considered as a dispute under this agreement.

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"(13) *All decisions of the Board shall be approved by a majority vote of the full membership of the Board, and shall be final and binding upon the parties to the dispute.*

"(14) If a dispute has been considered by the Board, *but a majority vote, as provided above, cannot be obtained, then, upon the request of either party to the dispute, the Board shall certify such dispute to the United States Railroad Labor Board for final decision, accompanied by all supporting papers.*"

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APPENDIX IV.

EXCERPTS FROM INTERSTATE COMMERCE ACT AND THE PACKERS AND STOCKYARDS ACT.

Interstate Commerce Act.

"Sec. 16. (1) If, after hearing on a complaint made as provided in Section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

"(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the District Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs

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in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

"3 (b). All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to sub-division (d) of this paragraph."

"3 (f). A petition for the enforcement of an order of the commission for the payment of money shall be filed in the District Court or the State Court within one year from the date of the order, and not after." (U. S. C. Title 49, Section 16, Paragraphs 1, 2, 3 (b), and 3 (f).)

Packers and Stockyards Act.

"(a). Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the 'defendant') in violation of the provisions of sections 205, 206, 207, or 208 of this chapter, or of an order of the Secretary made under sections 201 to 217 inclusive of this chapter, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing,

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within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper."

"(e). If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay the complainant the sum to which he is entitled on or before a day named."

"(f). If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the District Court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State Court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders

of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suits." (U. S. C. Title 7, Section 210, Paragraphs a, e, and f.)

[redacted]

Filed April 11, 1939

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IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action

File No. 1165

THE WASHINGTON TERMINAL COMPANY, *Plaintiff*,

v.

F. E. BOSWELL, ET AL., *Defendants*.

Plaintiff's Memorandum of Points and Authorities in Opposition to Memorandum Brief of Defendants.

Filed April 11, 1939

Nature of the Case.

This motion challenges the validity of the two defenses included in the answer which raise purely legal issues. Those defenses are, first, that the complaint fails to state a cause of action under the Declaratory Judgments Act (28 U. S. C., Sec. 400), and, secondly, that the complaint fails to state any cause of action.

Actually both defenses are in effect one and the same since it appears from defendants' memorandum brief that by the second defense they simply mean that on the case presented in the complaint no judicial remedy would at this time be available to the plaintiff otherwise than by way of declaratory judgment. This plaintiff concedes. It is in fact the reason why plaintiff seeks a declaratory judgment and not some other form of judicial relief.

The issue for present determination by this court is therefore whether on the facts stated in the complaint a petition for a declaratory judgment will lie. Defendants' contention that it will not lie is placed in their memorandum brief on a single very narrow ground, viz., that the controversy is of a nature which, under the Railway Labor Act, may be referred to the so-called Railroad Adjustment Board for settlement and that this provision of the Railway Labor Act operates to oust the jurisdiction of the ordinary courts to render a declaratory judgment.

Statement of Facts.

This is a suit of a civil nature for a declaration of rights under a certain written contract or "Collective Agreement" executed February 1, 1923, between the plaintiff and its employees of the class to which defendants belong, to the benefit of which contract plaintiff admits that defendants are entitled. Defendants have presented claims to the plaintiff that under said contract they are entitled by reason of seniority to do all the work of a certain character which is or may be performed on the premises of the plaintiff (Complaint, paragraph 19). Plaintiff contends that the defendants' rights of seniority under said contract do not entitle them to what they claim, and since said work is continuing to be performed by others, defendants have been and are presenting to plaintiff demands for sums of money as payment for the work which according to their contention plaintiff is preventing them from performing (Complaint, paragraph 29).

The controversy between plaintiff and defendants therefore turns wholly on the interpretation of a written contract, and the rights which are in dispute derive entirely from that contract. This is admitted in de-

fendants' memorandum brief, page 51, where it is said, referring to the claims of the defendants, that "these claims are based upon the agreement of 1923."

Again, at page 19 of their memorandum brief, defendants say:

> "The dispute between the plaintiff and the defendants in the present case is one growing out of the interpretation which the plaintiff has put upon the Collective Agreement of 1923."

It is true that after the dispute first arose the defendants, through their labor organization, presented their claim under the Railway Labor Act to the National Railroad Adjustment Board (Complaint, paragraph 19) and that Board, through an umpire, adopted and published an award supporting the defendants' claim. The Board, however, did not and could not create through its award any new rights for defendants other than those arising out of the contract and defendants accordingly admit in their brief that subsequent to the award of the Board, as well as prior thereto, whatever rights they claim are based on the contract and not on the order of the Board:

> "These claims are *based upon the agreement of 1923—not upon the order of the Board.*" (Emphasis as in defendants' brief, page 51)

Again, at page 53 of their brief, defendants say:

> "When the individual defendants presented to the plaintiff individual claims for compensation they necessarily based those claims upon the agreement—not upon the order, which has no substantive effect and is in itself unenforceable. . . . The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued."

Again, it is said in defendants' brief at page 5:

> "It is thus apparent that the dispute between the parties to this case is one growing out of the interpretation and application which the carrier has made of the Collective Agreement of 1923."

In short, the dispute which exists now between the parties is, as it has always been, a controversy as to the interpretation of a contract and the respective rights of the parties thereunder.

Issues of Law Presented.

It was precisely for the purpose of providing a more effective method of obtaining a judicial construction of written instruments and a determination of disputes arising out of such instruments that the Federal Declaratory Judgments Act was enacted. The Judiciary Committee of the Senate, in Senate Report No. 1005, 73rd Congress, 2nd Session, in recommending the passage of the Act, used the following language:

> "It enables disputes arising out of written instruments or otherwise to be adjudicated without requiring a destruction of the status quo and of the social and economic fabric. Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed."

The Act has been held to be especially applicable where one party to such a dispute makes a claim against the other and by failing to prosecute such claim through the channels of judicial procedure places the other at the disadvantage of having the amount of the claim increase, and of having to accumulate reserves against ultimate potential liability during the interval

of the first party's inaction. Thus, in *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 57 Sup. Ct. 461 (1937), a party insured by the plaintiff company presented a formal claim of a present specific right. The company made an equally definite claim that under the contract the right did not exist. The insured did not institute any action wherein the company would have an opportunity to prove the non-existence of the alleged right. It was held that under the Act the company became entitled to bring suit for a declaratory judgment against the insured because the character of the controversy and the issue to be determined was essentially the same whether presented by the insured or the insurer.

In the instant case it is alleged in plaintiff's complaint (paragraph 32) that "although the issues upon which the validity of the defendants' demands and the liability of plaintiff to satisfy them are as a matter of evidence and proof capable of determination at this time, the plaintiff by reason of there being no judicial determination of plaintiff's liabilities with respect to such demands is compelled to maintain and make available substantial amounts of money to satisfy such demands . . . in the event it should . . . be determined that the plaintiff is legally liable with respect thereto."

It therefore seems clear that apart from the possible existence of some special legal obstacle, the controversy which is the basis of the present proceeding is one which is pre-eminently of the character to which the Declaratory Judgments Act was intended to apply. It is a controversy concerning actual present rights under a written instrument, and, as in the *Haworth Case, supra*, a controversy which could be brought immediately to judicial determination by the action of the

defendants in instituting legal proceedings. The failure of the defendants to do so is placing the plaintiff at a serious disadvantage, and, on the doctrine of the *Haworth Case*, since the defendants could present the issue, the plaintiff is entitled to do so under the Declaratory Judgments Act.

The sole question is whether there are any special and peculiar legal barriers which prevent the plaintiff from doing so.

The defendants contend that there are two.

In the first place, defendants contend that plaintiff is not entitled to the benefits of the Declaratory Judgments Act because, by the Railway Labor Act, Congress has established a procedure whereby disputes between a carrier and an employe or group of employes growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions *may* be referred for adjustment by either party to the National Railroad Adjustment Board. Defendants apparently contend that this provision ousts the ordinary judicial courts of their jurisdiction over controversies with respect to the interpretation or application of such agreements.

Secondly, defendants contend that since the labor organization representing the defendants submitted the present controversy to the Adjustment Board and the Board made an award, the plaintiff is precluded from instituting court proceedings with respect to the controversy since to do so would be to make the declaratory judgment procedure a means of reviewing the decision of another court or tribunal of co-ordinate jurisdiction, viz., the Adjustment Board.

In the remainder of this brief it will be argued that both contentions are without merit.

Points and Authorities.

I.

THE FACT THAT THE RAILWAY LABOR ACT PROVIDES A PROCEDURE FOR ADJUSTING DISPUTES GROWING OUT OF THE INTERPRETATION OF AGREEMENTS BETWEEN CARRIERS AND THEIR EMPLOYES DOES NOT OUST THE JUDICIAL COURTS OF JURISDICTION TO RENDER DECLARATORY JUDGMENTS INTERPRETING SUCH AGREEMENTS.

The contention of the defendants that the plaintiff is denied the right to a judicial interpretation of its contract with its employees because Congress has provided that disputes arising under labor agreements may be adjusted through the procedure of the Railroad Adjustment Board is contrary to all the decided cases on the subject, which are numerous, as well as to reason and principle. It is well settled by the decisions that, in spite of the provisions of the Railway Labor Act, carriers and their employes may resort to the ordinary judicial courts for the enforcement of agreements respecting rules and working conditions either by way of an action for damages or a bill for an injunction. If the courts are open for proceedings of this character and the Railway Labor Act creates no bar, there is no sound reason for holding that they are not equally open for proceedings for a declaratory judgment. The arguments which would oust them of jurisdiction to render a declaratory judgment would, if valid, operate as effectively to oust their jurisdiction in damage suits and injunction proceedings. In the only case directly involving the point it has been expressly held that a declaratory judgment may be rendered in a controversy of the character which might be brought before the Railroad Adjustment Board. Defendants' argu-

ment that the existence of the Adjustment Board procedure ousts the courts of jurisdiction to render a declaratory judgment rests primarily on certain broad statements found in textbook authorities which, when properly read and construed in the light of the decisions upon which they rest, do not support the argument. Defendants' additional arguments drawn from the supposed policy of the Railway Labor Act find no support in the provisions of the Act; and the analogy attempted to be drawn from certain provisions of the Interstate Commerce Act breaks down in the light of the fact that those provisions have been held not to oust the jurisdiction of the courts. Each of these points will be developed.

A. *It is well established by the decisions that in spite of the provisions of the Railway Labor Act carriers and their employes may resort to the ordinary judicial courts for the enforcement of agreements respecting rules and working conditions either by way of an action for damages or a bill for an injunction.*

Since the enactment of the Railway Labor Act in its present form on June 21, 1934, cases have been numerous in which carriers or their employes have resorted to the courts either by actions for damages or by injunction proceedings to enforce rights claimed under contracts of the character which under the Railway Labor Act might have been submitted for adjustment to the Railroad Adjustment Board. Such cases are the following:

Brotherhood of Locomotive Engineers v. *Mills*, 43 Ariz. 379, 31 Pac. (2d) 971 (1934) (suit to enjoin defendants, including Southern Pacific Ry., from interfering with plaintiffs' seniority rights by merger of two railroads);

Florestano v. *Northern Pac. Railway Co.*, 198 Minn. 203, 269 N. W. 407 (1936) (suit at law for damages for alleged breach by the railroad of a seniority agreement);

Earl Moore v. *I. C. Railroad Co.*, 180 Miss. 276, 176 So. 593 (1937) (suit at law for damages for alleged breach by the railroad of a seniority agreement);

Swilley v. *G. H. & S. A. Ry. Co.*, 96 S. W. (2d) 105 (Tex., 1936) (action at law for damages for breach of contract of employment);

Nord v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936, cert. den. 300 U. S. 673, 57 Sup. Ct. 12) (injunction suit to restrain railroad and certain employes from interfering with plaintiff's seniority rights);

Lane v. *Union Terminal Co.*, 12 F. Supp. 204 (D. C. N. D. Tex., 1935) (suit in equity to enjoin defendant from depriving plaintiff of certain rights which he alleged were given to him by agreement);

Stukey v. *N. Y. C. & St. L. R. R. Co.* (Court of Common Pleas of Allen County, Ohio, 1936); (suit to enjoin railroad and a labor union from depriving plaintiff of certain seniority rights by reason of a consolidation of certain divisions of the railroad);

Franklin v. *Pennsylvania-Reading S. S. Lines*, 122 N. J. Equity 205, 193 A. 712 (1937) (suit in equity to prevent a change in the seniority status of plaintiffs which involved the construction of an agreement covering working conditions between the employees and the railroad);

McCrory v. *Kurn*, 101 S. W. (2d) 114 (Mo. 1936) (action at law for damages for wrongful discharge in violation of labor agreement);

Lyons v. *St. Joseph Belt Ry. Co.*, 84 S. W. (2d) 933 (1935) (action at law for damages for wrongful discharge in violation of collective agreement).

In not one of these cases did the court hold that it was ousted of jurisdiction to interpret and enforce

an agreement because the dispute with respect to the agreement was one which, under the provisions of the Railway Labor Act, might have been submitted to the National Railroad Adjustment Board.

In *Lane* v. *Union Terminal Co., supra,* the court, speaking of the effect of Section 3(p) of the Railway Labor Act upon Lane's right to maintain his suit, said (at page 205):

> "Lane does not rest for the equity powers which he invokes on the Railway Labor Act of 1934. He enters a court of general jurisdiction as a citizen, asking for his constitutional rights, not under the act nor by virtue of the act, but in spite of the act. The Clayton Act cases . . . are, it appears to me, besides the question. In cases of that class, recovery was sought by virtue of the national law itself. Without such national statute, there was no right of recovery. . . .
>
> "The same may not be said of Lane's rights as asserted here. He claims the right to labor. He claims certain seniority conditions. He claims to satisfy his employer. He claims that certain of his constitutional rights are about to be invaded. He seeks protection from such invasion against those whom he charges with the determination to trespass upon his rights in a court which has jurisdiction over the potential trespassers. That the alleged trespassers may be hiding behind a national statute does not limit Lane's right to enter the court of his choice. He has a right to sue where he pleases."

In *Nord* v. *Griffin, supra,* it was argued against the jurisdiction of the court that under the provisions of the Railway Labor Act the district courts are given jurisdiction in certain cases to "enforce" awards of the Railroad Adjustment Board, and that therefore, except in such enforcement proceedings, they were ousted of all other jurisdiction with reference to con-

tracts which might be made the subject of such awards. This argument the court rejected, saying (at pages 483 and 484):

> "Nor do we believe that the Railroad Labor Act in any way limited the jurisdiction of the District Court as previously conferred. . . . The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied."

In *Stukey* v. *N. Y. C. & St. L. R. R. Co., supra*, certain employes of a railroad sought an injunction to restrain the railroad and a labor organization from depriving them of seniority rights by a consolidation of divisions of the railroad. The contention was made that the word "may" in Section 3(i) of the Railway Labor Act[1] was mandatory, that the remedy therein provided was an exclusive one, which deprived the court of jurisdiction over the controversy. The court rejected this contention and said:

> "The word 'may' in Sections 153-i and 155 of this Act seems only to have been used in a 'permissive' sense and there does not seem to be anything in the Act to warrant an interpretation that it is used in a 'mandatory' sense."

Elsewhere the court said:

> "It is claimed that the spirit as well as the language of the Act requires that the disputes be

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[1] Section 3(i) of the Railway Labor Act provides:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

> brought before the Railroad Adjustment Board as well as authorizing such a course. Whatever may be interpreted as the spirit of the Act the language of the Act nowhere by clearly expressed intention attempts to vest exclusive jurisdiction in the National Railroad Adjustment Board."

These cases but illustrate and apply the elementary principle that where a statute does not create a new and purely statutory right but simply provides a novel method of procedure for determining and enforcing a right which exists at common law, the statutory remedy will be held to be merely cumulative and not exclusive in the absence of express statutory provision making it exclusive.

Of numerous decisions illustrating this principle, the following ones may be cited:

> *Petition of State ex rel. Hutchinson*, 182 S. C. 369, 189 S. E. 475 (1937);
> *Kerbach Co.* v. *City of Long Beach*, 8 Cal. App. (2d) 567, 48 Pac. (2d) 181 (1935);
> *Cann* v. *Williams Land & Live Stock Co.*, 56 Nev. 242, 48 Pac. (2d) 887 (1935);
> *Blaine County Canal Co.* v. *Hansen*, 49 Idaho 649, 292 Pac. 240 (1930);
> *Tucker* v. *Missoula Light and Water Co.*, 77 Mont. 91, 250 Pac. 11 (1926).

In *Petition of State ex rel. Hutchison, supra*, a South Carolina statute provided a method for securing the appointment of a receiver for securities deposited by foreign insurance companies with the State insurance commissioners in the event of the companies' insolvency and provided that a creditor "may, at any time, bring, in the Circuit Court for the County of Richland," an action for this purpose. Instead of proceeding under the statute, one Carroll applied to the Cir-

cuit Court of Marlboro County under its general equity powers and secured the appointment of a receiver. This proceeding was thereupon brought in the State Supreme Court for a writ of prohibition to prohibit further proceedings in the Circuit Court of Marlboro County on the ground that the statute provided an exclusive remedy and therefore the Circuit Court of Marlboro was without jurisdiction. The writ was denied. It was held that the remedy was not exclusive but only "alternative or cumulative" because the right sought to be enforced was not one created by the statute. The court said (at page 477):

> "It is to be noted that there is no language in this section of the Code suggesting or declaring that the method of procedure therein outlined shall be mandatory or exclusive; there are no words of negation or prohibition which prohibit the other circuit courts of the state from entertaining jurisdiction. It would seem reasonable to conclude that, if the Legislature had intended to give the circuit court of Richland county exclusive jurisdiction in actions of this kind, it would have used apt words, clearly indicating such intention.
>
> "It has generally been held that a statutory remedy to enforce a new right or liability created by the same statute is exclusive unless the statute clearly shows a contrary intention. Such an exclusion, however, depends upon the creation of a new right.
>
> • • • • • •
>
> "The section of the Code under discussion does not provide a new right or create a new cause of action, but merely provides a cumulative remedy."

To the same effect is *Cann* v. *Williams Land & Live Stock Co., supra,* where the court said:

> "Where a statute providing a remedy does not create a new right, but merely provides a new rem-

> edy for a pre-existing right, it is ordinarily held that such remedy is not exclusive, but merely cumulative . . . Any right may be asserted or any wrong redressed under the new procedure that could have been asserted or redressed under the old, while on the other hand the change does not create any new rights or causes of action, or authorize a recovery where none could previously have been had in any form of action. If a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not as a rule take away the common law remedy, but the parties may still sue at common law as well as upon the statute. In such cases the statutory remedy is regarded as merely cumulative. 1 R. C. L. 323, 324; 1 C. J. 988, 989, 991, 1003, 1004; Pomeroy, Code Remedies (5th ed.) Sections 8, 9, 13."

There is no contention that the Railway Labor Act creates the rights under labor contracts for the adjustment of which it provides its peculiar procedure. Those rights are contract rights arising out of and existing under common law. As already pointed out, defendants not only admit but reiterate this in their brief in the passages quoted above where they emphasize that the rights in dispute in the case at bar are based upon the agreement of 1923 and that the controversy between the parties here is one growing out of the interpretation and application of that agreement.

Long before the Railway Labor Act of 1934 was enacted, labor contracts of the character here in question formed the subject matter of controversy in the courts under the established principles of the common law and of equity and the courts took jurisdiction of

their interpretation and enforcement. Among such cases may be cited the following:

Piercy v. *L. & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923) (suit for declaratory judgment construing agreement between employes and the railroad and declaring plaintiff's rights thereunder);

McGregor v. *L. & N. Ry. Co.*, 244 Ky. 635, 51 S. W. (2d) 952 (1932) (action by a telegraph operator against railroad to enforce seniority rights under a contract between the railroad and telegraphic employees);

Panhandle & S. F. Ry. Co. v. *Wilson*, 55 S. W. (2d) 216 (Tex. 1932) (action at law for damages for alleged breach of an agreement covering seniority);

Gregg v. *Starke*, 189 Ky. 32, 224 S. W. 458 (1920) (bill in equity for an injunction to restrain defendant railroad and its general manager from removing plaintiff from his position as conductor on a certain train);

Rentschler v. *Missouri Pac. Ry. Co.*, 126 Neb. 493, 253 N. W. 694 (1934) (action at law to recover wages alleged to be due for a period during which plaintiff was out of work due to a reduction in forces—plaintiff alleged violation of a seniority agreement);

McCoy v. *St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934) (action for damages for breach of an agreement regulating seniority);

George T. Ross Lodge v. *Brotherhood of Railroad Trainmen, et al.*, 191 Minn. 373, 254 N. W. 590 (1934) (bill in equity to restrain labor union and the Northern Pacific Railway Co. from interfering with plaintiff's seniority rights);

Gary v. *Central of Georgia R. Co.*, 37 Ga. App. 744, 141 S. E. 819 (1928) (action at law for dam-

ages for breach of contract covering working conditions between employees and railroad);

Long v. *B. & O. R. Co.*, 155 Md. 265, 141 A. 504 (1928) (suit for injunction to compel railroad to recognize and enforce plaintiff's alleged right to a particular position by virtue of an agreement between the railroad and employees);

Cowles v. *Arkansas & L. M. Ry.*, 10 Fed. (2d) 242 (D. C. W. D. La., 1925) (suit in equity on claims of employes against railroad for back pay under an order of the Director General of Railroads).

In view of these cases and the principles which they illustrate, it is entirely clear that rights under labor contracts do not derive their validity from the Railway Labor Act of 1934 and that all that that Act does is to provide, alongside the established legal remedies, an available procedure for informal settlement and adjustment of controversies. It seems clear that that procedure is intended to be cumulative and not exclusive. Defendants in effect point this out in that section of their brief (pages 20 to 33, inclusive) where they emphasize that throughout the steps leading up to the passage of the Railway Labor Act Congress sought to provide for the voluntary adoption of methods of adjustment by the parties themselves and has never attempted to force the parties to submit to any compulsory adjustment procedure. As the defendants so aptly point out on pages 20 and 21 of their brief, the National Adjustment Board established by the Act departs from judicial concepts both in its composition and in its procedure. The defendants point out that the Board is intended "to adjust matters submitted to it" and that "a reasonable and acceptable

compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created." It is impossible to believe that by the establishment of an informal agency of this character to compromise and adjust differences Congress could have intended to oust the courts from their jurisdiction to determine legal rights and accordingly there is not a single case which holds that the jurisdiction of the courts has in fact been ousted by the Act.

B. *If the effect of the Railway Labor Act is not to oust the jurisdiction of the courts generally, or in damage suits and injunction proceedings, it does not operate to oust their jurisdiction in proceedings under the Declaratory Judgments Act.*

It has been established in the preceding section that the effect of the Railway Labor Act is not to oust the jurisdiction of the courts generally in respect of the interpretation and enforcement of agreements between carriers and their employes by way of actions at law or in injunction proceedings. This seems so clear that defendants make no effort in their memorandum brief to deny it. They take refuge instead in the narrower position that the Railway Labor Act ousts the jurisdiction of the courts in respect of proceedings for a declaratory judgment. This contention is based primarily on an apparent misunderstanding of certain statements of textbook authorities, as will be pointed out in the next section of this brief. In the meanwhile, it is important to note that nothing in precedent or principle justifies the contention that where the jurisdiction of the courts is not ousted generally, and persists with respect to damage suits and injunction proceedings, it is specially ousted with respect to declara-

tory judgment. As a matter of fact, the history and development of the jurisdiction of the courts with respect to the interpretation of labor agreements under the declaratory judgment procedure has followed exactly the same course before and after the enactment of the Railway Labor Act as has their jurisdiction in damage suits and injunction proceedings.

As early as 1923 a proceeding was brought in Kentucky under the Declaratory Judgment Act of that State to determine the seniority rights of conductors in the operation of trains on interdivisional runs under a contract then in effect between the Brotherhood and the Louisville & Nashville Railroad (*Piercy* v. *L. & N. R. Co., supra.*) The court took jurisdiction and made a declaration of rights in favor of plaintiff on the basis of its interpretation of the terms of the agreement.

Subsequently a proceeding was brought under the Declaratory Judgment Act of Oregon to obtain a declaration of a plaintiff's seniority rights under an agreement. The court took jurisdiction, construed the agreement in the light of the practice which had prevailed under it, and gave judgment for the defendants (*Burton* v. *Oregon-Washington Railroad & Navigation Co.*, 148 Oregon 648, 38 Pac. (2d) 74 (1934)).

In the only like case which has arisen since the enactment of the Railway Labor Act, the provisions of that Act were not treated as ousting the jurisdiction of the courts in declaratory judgment proceedings any more than in injunction proceedings and actions for damages. The case is *Louisville & Nashville R. Co.* v. *B. F. Bryant, et al.*, decided by the Court of Appeals of Kentucky, 263 Ky. 578, 92 S. W. (2d) 749 (1936). Bryant and another employe of a railroad brought a proceed-

ing against the railroad and certain other employes for a declaration of their seniority and other contract rights. The court took jurisdiction, construed the agreement, and made a declaration of rights which was in part affirmed and in part reversed on appeal.

Thus, it seems clear that there is no ground for drawing a distinction between the declaratory judgment procedure and other forms of proceedings, such as damage suits and bills for injunctions, which would require or justify the conclusion that if the jurisdiction of the courts has not been ousted with respect to the latter it has been ousted with respect to the former. So far as they relate to jurisdiction over the subject matter of a cause of action, declaratory judgments acts have no effect to widen or narrow that jurisdiction. They simply provide a new form of remedy where jurisdiction over the subject matter already exists. As Professor Borchard has said with reference to the Federal Declaratory Judgments Act in an article written shortly after the passage of the Act (Borchard, *The Federal Declaratory Judgments Act*, 21 Virginia L. Rev. 35, 39 (1934)):

> "The Act is merely an amendment to the Judicial Code defining the Federal jurisdiction, and while ostensibly conferring on the courts an additional power in cases already within their jurisdiction by reason of person and subject matter, does not add to such jurisdiction in any respect."

If, then, the Declaratory Judgments Act simply operates within the jurisdiction of a court as that jurisdiction already exists and neither broadens nor narrows it, it seems clear that if the existing jurisdiction, as has been shown above, is not in any way cut down by the provisions of the Railway Labor Act, it survives

as fully for the purposes of the Declaratory Judgments Act as it survives for the purpose of damage suits and injunction proceedings.

C. *Defendants' argument that the existence of the Adjustment Board procedure ousts the courts of jurisdiction to render a declaratory judgment rests primarily on certain broad statements found in text book authorities which, when properly read and construed in the light of the decisions upon which they are based, do not support the argument.*

Defendants' contention that the existence of the Railroad Adjustment Board procedure, while it does not oust the jurisdiction of the courts in damage suits and injunction proceedings, does oust their jurisdiction in Declaratory Judgment proceedings, rests on a quotation from Borchard (Declaratory Judgments, 156-157 (1934)), given at page 13 of their memorandum brief, and on similar language quoted from 16 American Jurisprudence 295, at page 12 of defendants' brief.

The quotation from Borchard is as follows:

> "Where, however, a special statutory method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case and it was not intended that a declaration should be employed for such a purpose."

The pertinent part of the quotation from American Jurisprudence is as follows:

> "A court may not have jurisdiction to render a Declaratory Judgment where another statutory

remedy has been especially provided for the character of case presented if the effect would be to interfere with the rights of the parties to appeal to the court given jurisdiction in that particular matter by the Statute."

These statements of the law derive whatever authority they may have from the actual decisions on which they purport to be based and which are cited in the footnotes supporting them. An examination and analysis of these decisions plainly indicates that the statement that "a court may not take jurisdiction to render a Declaratory Judgment where another statutory remedy has been especially provided for the character of case presented" means, as might indeed be supposed, that this is true only if the "statutory remedy especially provided" is an *exclusive* remedy which ousts the courts of general jurisdiction. The same conclusion follows from the cases specifically cited and discussed in defendants' brief (pages 13-16, inc.).

Of these cases, four were decided by Pennsylvania courts, viz: *Petition of Kariher*, 284 Pa. 455, 131 Atl. 265 (1925); *City of Erie* v. *Phillips*, 323 Pa. 557, 187 Atl. 203 (1936); *Bell Telephone Company* v. *Lewis*, 313 Pa. 374, 169 Atl. 571 (1934); and *McCalmont* v. *McCalmont*, 93 Pa. Superior Ct. 203 (1928). The first three merely repeat, by way of dictum, the statement that a proceeding to obtain a declaratory judgment may not be entertained where a special statutory remedy has been provided for the character of case in hand. The fourth, *McCalmont* v. *McCalmont*, involved an attempt to secure a declaratory judgment for the purpose of annulling a marriage. The legislature had already prescribed in detail the procedural requirements neces-

sary to be followed for the dissolution of marriages and such procedure was exclusive.

The references by the courts in all these Pennsylvania cases to the statement that a declaratory judgment will not be issued where a special statutory proceeding has been provided for the character of case in hand support the principle that by "special statutory remedy" is meant an exclusive remedy that ousts the courts of jurisdiction to proceed except in accordance with the special remedy. This is true because where a remedy or method of procedure is provided by statute in Pennsylvania such a remedy is exclusive by reason of a general act of the Legislature so providing.[2]

Aetna Life Insurance Co. v. *Quarles*, 92 Fed. (2d) 321 (C. C. A. 4th, 1937) merely quotes, as dictum, Borchard's statement above referred to.

The remaining cases cited by the defendants, viz: *Young* v. *Bridges*, 86 N. H. 135, 165 Atl. 272 (1933); *Stewart* v. *Hertin*, 125 Neb. 210, 249 N. W. 552 (1933); and *Moore* v. *Louisville Hydro Electric Co.*, 226 Ky. 20, 10 S. W. (2d) 466 (1928) also illustrate the application of the principle that by "special statutory rem-

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[2] The Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, Sec. 13, 46 P. S. Sec. 156, provides:

> "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

It has been held that, by reason of the operation of the Act of 1806, where a remedy or method of procedure is provided by statute the directions of such statute must be strictly construed and such remedy is exclusive, *Ermine* v. *Frankel*, 322 Pa. 70, 185 Atl. 269 (1936); *Bowman* v. *Gum, Inc.*, ————, 184 Atl. 258 (Pa., 1936); *White* v. *Old York Rd. Country Club*, 318 Pa. 346, 178 Atl. 3, (1935); *In Re Stetson's Estate*, 305 Pa. 62, 155 Atl. 856 (1931).

edy" is meant an exclusive remedy that ousts the courts of general jurisdiction.[3]

The cases just reviewed establish that the statutory remedies which operate to deprive courts of general jurisdiction to render Declaratory Judgments are *exclusive* remedies which would equally operate to oust the ordinary courts of jurisdiction to entertain any other form of proceeding. That the Railway Labor Act does not have that effect has been shown in the preceding sections of this brief.

The conclusion that a statutory form of remedy must be exclusive to oust jurisdiction to render a declaratory judgment is fully substantiated by an examination and analysis of the decided cases upon which the general statements quoted above from Borchard and American Jurisprudence are rested by the authors. The statement in American Jurisprudence is rested on four annotations in American Law Reports, viz.: 12 A. L. R. 75; 50 A. L. R. 48; 68 A. L. R. 119; 87 A. L. R. 1219. Reference to the cases cited in these annota-

[3] In *Young* v. *Bridges*, *supra*, a Declaratory Judgment was asked as to the distribution of an estate. The court very properly pointed out that courts of general jurisdiction are without power to decree the distribution of estates, since such jurisdiction has been exclusively conferred on probate courts and the power to render a Declaratory Judgment does not operate to broaden the jurisdiction of the court. Clearly, where a Declaratory Judgment is sought with reference to a matter which lies outside the jurisdiction of the court in which the petition is brought, the court is without jurisdiction to entertain it. This is also the explanation of *Stewart* v. *Hertin*, 125 Neb. 210, 249 N. W. 552, cited at page 15 of defendants' brief.

In *Moore* v. *Louisville Hydro Electric Company*, *supra*, an attempt was made to obtain through the Declaratory Judgment procedure a determination of a matter lying within the jurisdiction of the Workmen's Compensation Board. It was held that the Declaratory Judgment proceedings would not lie because in the language of the court:

> "The entire mechanics of the law shows that it was the legislative intent to vest exclusive original jurisdiction to hear and determine matters within the purview of the Act in the Workmen's Compensation Board" (Quoted at page 16 of defendant's memorandum brief).

tions discloses that they fall into three groups. One group of cases which may be immediately eliminated apply the rule that a Declaratory Judgment will not be granted where another adequate remedy exists.[4] This rule, which is applied in a number of States, is expressly repudiated in the federal jurisdiction by Court Rule No. 57, which provides that:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

A second group of cases cited by A. L. R. and relied upon by American Jurisprudence denied a Declaratory Judgment on the ground that the subject matter in dispute was either pending in another suit previously brought or had already become *res adjudicata.*[5]

The third group of cases bear directly on the question of what is meant by the statement that a Declaratory Judgment proceeding may not lie where a special statutory remedy has been provided and support with-

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[4] *West* v. *Lord Sackville*, (1903) 2 Ch. 378, was not an action for a declaratory judgment but an attempt to "perpetuate testimony" for the purpose of establishing the legitimacy of a child prior to its father's death. The court said that the right to perpetuate such testimony was given only by a court rule and could only be granted at the court's discretion, and that inasmuch as a more efficacious remedy could be had under the Legitimacy Declaration Act of 1858, the court would not permit the perpetuation of testimony in this manner.

Washington-Detroit Theatre Co. v. *Moore*, 229 N. W. 618 (Mich. 1930);
Stenzel v. *Kronick*, 283 Pac. 93 (Cal. App., 1929);
Goldberg & Sons v. *Gilet Bldg. Corp.*, 135 Misc. 158, 237 N. Y. Supp. 258 (1929);
Sterrett's Estate, 300 Pa. 116, 150 Atl. 159 (1930);
Kaaa v. *Waiakea Mill Co.*, 29 Haw. 122 (1926);
Aetna L. Ins. Co. v. *Richmond*, 107 Conn. 117, 139 Atl. 702 (1927);
Kimmell's Appeal, 96 Pa. Superior Ct. 488 (1929).

[5] *Proctor* v. *Avondale Heights Co.*, 200 Ky. 477, 255 S. W. 611, (1923);

State v. *Wyandotte County*, 117 Kans. 151, 230 Pac. 531 (1924);
Leafgreen v. *La. Bar*, 293 Pa. 263, 142 Atl. 224 (1928);
Shearer v. *Backer*, 207 Ky. 455 269 S. W. 543 (1925).

out exception the conclusion stated above that by "special statutory remedy" is meant an exclusive statutory remedy.[6]

An examination of the authorities cited by Professor Borchard in support of his statement of the rule also leads to the conclusion that when he speaks of a "special statutory proceeding" he means an exclusive statutory proceeding.[7]

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[6] Thus, in *Mutre* v. *Alexander*, 23 Ont. Law Reports 396 (1911), the high court refused to grant a declaratory decree involving the validity of a will, for the reason that the court had no testementary jurisdiction and the subject matter of the controversy was vested in the Surrogate Court.

In *M. Y. & R. Ry. Co.* v. *Township of Cornwall*, 29 Ont. Law Reports 522 (1913), exclusive jurisdiction over the assessment of taxes was lodged by statute in the Municipal Board, and therefore it was held that the courts had no jurisdiction to make a declaration of rights with respect thereto.

In *Mayor of Davenport* v. *Toser* (1902), 2 Chancery 182, a bill was filed by a municipality against the owners of certain land for a declaration that the plaintiffs were entitled to move, alter, pull down or otherwise deal with any works thereon begun by the defendants. In refusing a Declaratory Judgment, the court said (page 184) with reference to a statutory remedy available to the plaintiffs:

> "A liability not now existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it. The company is bound to follow the form of remedy provided by the statute which gives them the right to sue."

The court held in *Wight* v. *Board of Education*, 99 N. J. Eq. 843, 133 Atl. 387 (1926), that the power to issue declaratory judgments was vested in a separate equity court and the subject matter of the case presented was one over which the equity court had no jurisdiction. To the same effect is *Union Trust Co.* v. *Georke* Co., 103 N. J. Eq. 159, 142 Atl. 560 (1928) (modified, in other respects, in 147 Atl. 439).

Moore v. *Louisville Hydro-Electric Co., supra.*

[7] He cites *Moore* v. *Hydro-Electric Co.*; *West* v. *Lord Sackville*; *Mayor of Davenport* v. *Toser*; and *McCalmont* v. *McCalmont*, all discussed *supra.*

Other authorities which he cites are as follows:

Flint v. *Attorney General* (1918), 1 Chancery 216. This was a proceeding to obtain a Declaratory Judgment that the plaintiff was exempt from military service under the provisions of the Military Service Acts of 1916. The Military Service Acts provided a procedure whereby persons in the situation of the plaintiff could establish their right to exemption from service. The court decided that it was not one of the courts included

It accordingly seems clear that the principle relied on by the defendants on the authority of Professor Borchard and American Jurisprudence is not so broad as to exclude the jurisdiction to render declaratory judgments wherever there is any alternative statutory remedy available, but reaches only to cases where the statutory remedy is exclusive, either because expressly made so by the legislature or because created by the same statute which creates the right. That the statutory remedy or procedure established by the Railway

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in this statutory procedure and was, therefore, without jurisdiction over the controversy.

Smeeton v. *Attorney General* (1920), 1 Chancery 85. This was a petition for a declaration that the plaintiff was not required to file an excise profits return and was not required to pay a tax. In denying the declaration, the court pointed out that the tax statute provided a procedure by way of appeal to the Revenue Judges from an assessment by the Tax Commissioners and that the plaintiff's remedy lay through the statutory procedure.

Marine Lighterage Corporation v. *Luckenbach*, 139 Misc. 612, 248 N. Y. Supp. 71 (1931). This was a petition for a Declaratory Judgment to the effect that wharfage charges assessed against the plaintiff were excessive. In New York, wharfage charges are by statute fixed by Commissioners and the rights and remedies of the parties are prescribed in the same statute. The petition was, therefore, refused.

Haan v. *Haan*, 133 Mis. 197, 231 N. Y. Supp. 58 (1928), a petition was filed for a declaration that the infant plaintiff was the legitimate child of the defendant and entitled to support. The petition was refused because by statute proceedings relating to children born out of wedlock are within the exclusive jurisdiction of the Court of Special Sessions of the City of New York.

It is to be noted that in the foregoing cases the rights sought to be adjudicated by the declaratory judgment procedure were not rights which, like rights under a private contract, derive from the common law, but were rather rights of special statutory origin and, accordingly, under the principles discussed in earlier sections of this brief the procedures established by the statutes creating the rights in question were held to be exclusive. This is true also of *Grand Junction Water Works Company* v. *Hampton Urban District Council* (1898), 2 Chancery 331, cited by Professor Borchard.

Oldham County v. *Arvin*, 244 Ky. 551 (1932), also cited by Professor Borchard, went on the ground, not available under the Federal rules, that a petition for Declaratory Judgment must be denied if there is another adequate remedy.

Labor Act is not of this character has been made abundantly plain in the two preceding sections of this brief.

D. *The policy of the Railway Labor Act as embodied in the statute does not oust the jurisdiction of the courts to determine and enforce legal rights arising under contracts between carriers and their employes; and if it did so operate to oust jurisdiction in declaratory judgment proceedings it would operate likewise to oust jurisdiction in damage suits and injunction proceedings, which is shown by the precedents not to be the case.*

Defendants argue at page 17-45 of their memorandum brief that by the provisions of the Railway Labor Act Congress has prescribed "a definite procedure to be followed in this type of case" and seek apparently to create the impression that this procedure, in spite of the use of the permissive word "may" in Section 3(i) of the Act, was intended by Congress to be compulsory and exclusive because of the supposed policy of Congress underlying the Act. As pointed out above, this suggestion has been repeatedly rejected in the decided cases and there is no decision supporting it. It remains to be pointed out that it is equally without support in principle or reason.

It should be noted at the outset that, as already emphasized here and admitted by the defendants, the rights with the interpretation and enforcement of which we are concerned are rights growing out of the common law of contract and not special privileges created by statute.

The proposition which defendants urge upon this court is that the protection of these rights has been wholly removed from the jurisdiction of the ordinary

judicial courts and exclusively vested in a type of procedure which they describe with great fullness in their brief as frankly "non-judicial" in character, saying among other things (at page 67 of defendants' memorandum brief) that the function of the Adjustment Board "is not to adjudicate as to rights but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction and without interruption." This is nothing else than to say that Congress has empowered the Board to substitute new rights and obligations between the parties in place of those which they have created by their contract, and to that extent impose a new contract upon them.

Plaintiff does not admit that this is a proper construction of the powers vested in the Board by the statute. However, if it be assumed solely for the purpose of argument that the powers and functions of the Board are to be construed as defendants construe them, it would seem to follow with all the greater force that Congress has not presumed by the establishment of a Board with such powers and functions to oust the judicial courts from their normal jurisdiction to adjudicate rights arising out of contract.

To accept the view that the jurisdiction of the courts to adjudicate is ousted by the establishment of an agency whose function is not to adjudicate but instead to create new relationships by way of "adjustment" would be to say that all jurisdiction to adjudicate such rights had been completely destroyed, a conclusion which plaintiff submits would obviously be violative of the guarantees contained in the Constitution of the United States.

Accordingly, leaving out of account in the present connection the unbroken line of decided cases which hold that the establishment of the procedure under the Railway Labor Act does not oust the jurisdiction of the ordinary judicial tribunals, the question to be considered is whether by the provisions of the Railway Labor Act Congress has indicated a plain intention of a policy to exclude that jurisdiction in favor of the jurisdiction of a board acting in the manner and for the purposes described in defendants' brief.

Defendants point out that the provisions of the Railway Labor Act establishing the National Board of Adjustment are the culmination of a course of experience and experimentation in the settlement of disputes by mutual adjustment dating back to the period of Federal war-time control of the railroads. As a result of the earlier stages of this experience it was provided by the Transportation Act of 1920 that individual carriers might by agreement with their employes or groups of employes establish boards of adjustment for the settlement of disputes (Transportation Act of 1920, Sections 301-303, inclusive, set forth in defendants' memorandum brief, pages 27, 28). In addition to these boards to be set up by individual agreements, provision was also made for the setting up by agreement between a group of carriers and groups of employes of so-called "regional" Boards of Adjustment with a right of appeal in certain cases from the settlements arrived at by these boards to the United States Railroad Labor Board established by the Act.

Defendants admit and indeed insist that the Railroad Adjustment Board established by the Act of 1934 is but a continuation of the device of regional and system boards which functioned since 1920. "It continued

the pre-existing policy of the Government in this regard" (Defendants' memorandum brief, page 30). In this connection a highly significant provision of the Railway Labor Act of 1934 must be mentioned. That Act does not vest the Railroad Adjustment Board with any exclusive jurisdiction to settle and adjust disputes under contracts providing for rules and working conditions. On the contrary, the Act expressly authorizes, as the previous acts had done, separate boards to be established by agreement with individual carriers and provide that where such boards have been established disputes of the character which would otherwise go to the Adjustment Board shall be heard and determined by such separate boards.[8]

In short, the provision of the Railway Labor Act for procedure through the National Railroad Adjustment Board is only one alternative form of procedure set up by that Act, the other procedure being through system and regional adjustment boards. Obviously, if the procedure established by the Act is to be regarded as ousting the jurisdiction of the courts, this must be true of the procedure through such system or regional boards as well as of the procedure through the National Railroad Adjustment Board. Accordingly, if defendants' contention is sound, wherever there is in operation a system board established by agreement between a carrier and its employes to adjust disputes, the existence of this board would operate to prevent the judicial determination of issues arising between the carrier and its

[8] The provision in question is the second sub-division of Section 3 of the Act reading as follows: "nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section."

employes under their contracts. In short, the jurisdiction of the courts would be as effectively ousted by a purely informal and private group of adjusters or mediators as by the board known as the National Railroad Adjustment Board established by the Act.

Defendants are at pains to point out in their brief that the Railroad Adjustment Board is in effect as much a private and informal body as the system adjustment boards. Under the statute (Railway Labor Act, Sec. 3, First, (a)) the Adjustment Board is not selected or appointed by public authority, but consists of an equal number of members selected by "the carriers" and by "such labor organizations of the employes, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act."

Defendants are quite frank in disclosing their conception of the nature and operation of the Adjustment Board, saying:

> "Both in personnel and in organization this Board departs somewhat from traditional judicial concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are pre-disposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just and he will prevail." (Defendants' memorandum brief, page 20.)

An additional fact is pointed out by the defendants as follows:

> "A judge decides the case before him, while, as its name implies, this Board is intended to adjust

matters submitted to it. 'Compromise' judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created." (Defendants' memorandum brief, page 21.)

In view of these facts it is not surprising that the defendants insist that the National Railroad Adjustment Board does not act judicially (Defendants' memorandum brief, pages 54-70). They say:

> "Its own organization is not that of a non-partisan judicial tribunal, but of a bi-partisan conference group. Its function is to adjust, to compromise, to settle, rather than to judge the disputes which come before it" (Defendants' memorandum brief, page 65).

Again they say:

> "The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement. The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decisions which the Board is empowered to make in relation to a dispute before it.
>
> "The function of a court is to render a judgment between parties who are before it as litigants. Such a judgment has the effect of establishing the parties' present rights. With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary. It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decree are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. The future of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption." (Defendants' memorandum brief, pages 66-67)

Nothing can be clearer from the passages hitherto quoted from the defendants' brief than their conception that it is not the function of the National Railroad Adjustment Board to adjudicate and declare existing legal rights but to substitute new arrangements between the parties in the light of what the Board considers as most conducive to their future "cordial" relationship.

A further contention of the defendants advanced at pages 36 and 37 of their brief would seem of special significance. There the defendants say:

"The Congressional plan . . . has as its cardinal principal that the parties should be given every inducement to agree upon a practicable settlement of their differences. Thus, even if an order has been made by the Board, that Board has no authority to enforce it. No legal compulsion is placed upon a carrier to comply. The orders of the Board find their primary sanction in the collective economic bargaining power of the employees."

In short, the scheme of procedure established by the Railway Labor Act as conceived by defendants may be summarized as follows: first, that the parties to a dispute growing out of legal rights under a contract are remitted to a tribunal which is not judicial in character and where the success of one party or the other depends upon the ability of the party in question to obtain the assent of one or more members of the tribunal "whose natural predisposition is against him"; second, that the function of this tribunal is not to decide what are the present legal rights of the parties under their contract but to adjust the dispute if necessary by establishing new arrangements and relationships of a character which in the opinion of the tribunal will be best for the future relations of the parties; and, third, that after the tribunal has made a decision of the character just described, the primary sanction supporting the decision will be the "collective economic bargaining power of the employees," viz. their right to strike.

So construed, the Adjustment Board procedure requires the carrier to submit to have its contract rights replaced by new rights and obligations imposed by the absolute and unfettered discretion of the Board and invites the carrier to resist the imposition of these new rights and obligations only at the peril of bringing down upon its head the private forces implicit in a strike.

What the defendants are asking this court to hold in the instant case is that Congress has intended this procedure not as cumulative and ancillary to the jurisdiction of the courts but as a complete substitute therefor; in other words, as pointed out above, that Congress has intended to destroy the right to an adjudication of legal rights by way of the impartial judgment of judicial tribunals and to substitute therefor nothing

but the power of a bi-partisan board to create new rights and obligations at will which rest for their support primarily upon the private force involved in the right to strike.

If Congress has done this, then it has in effect destroyed all contracts and contract relations between the carriers and their employes, since a contract cannot be said to be legally a contract unless the rights under it are capable of being legally enforced and clearly a contract is not legally enforced by procedure which is avowedly aimed towards the substitution of new rights and obligations dictated by the tribunal for the old rights and obligations agreed to by the parties and embodied in their contract.

Clearly there should be reluctance to reach the conclusion that Congress has intended the Railway Labor Act to be construed in a sense which would necessarily raise the very grave constitutional difficulties implicit in the construction for which defendants contend (*United States* v. *D. & S. T. Ry. Co.*, 213 U. S. 366 ( )).

That there would seem to be no ground for such a construction is shown by the unanimous holdings of all the cases, both those decided subsequent to the Railway Labor Act and those decided during the period when boards were functioning under the Acts of 1920 and 1926, to the effect that the existence and jurisdiction of adjustment boards which may compromise and adjust future relationships does not oust the jurisdiction of the courts to declare and enforce existing rights.

E. *The analogy of the Interstate Commerce Act and the Packers and Stockyards Act lends no support to defendants' contention that the Railway Labor Act ousts the jurisdiction of the ordinary courts.*

Defendants apparently suggest in their memorandum brief at pages 35-36 and again at pages 61-64, that since in certain cases arising under the reparations provisions of the Interstate Commerce Act (Section 16) and the Packers and Stockyards Act, it has been held that the courts are without jurisdiction to entertain a suit for reparation, but that the procedure through administrative channels must be followed, and since the language of the Railway Labor Act is analogous to those provisions of the Interstate Commerce Act and the Packers and Stockyards Act, it follows that under the Railway Labor Act the procedure through the National Adjustment Board is exclusive and resort may not be had to the ordinary courts.

This argument is without merit for three reasons:

1. While it is true that in certain classes of cases under the reparations provisions of the Interstate Commerce Act it has been held that the remedy through the Commission is exclusive it has been held in other classes of cases arising under precisely the same language of the statute that the administrative remedy is not exclusive and that resort may be had in the first instance to the courts, which clearly indicates that the result in question does not flow from the statutory language and that therefore the analogy of that language to the language of the Railway Labor Act does not have the effect which defendants attribute to it.

2. Secondly, it is to be noted that the rights which are the subject matter of the instant controversy are

ordinary common law rights of contract not deriving from the Railway Labor Act or any other statute, while, on the contrary, the rights at issue under the Interstate Commerce Act and the Packers and Stockyards Act are rights which flow from the statute itself, with the result that under the general rule already stated the statutory remedy provided for the enforcement of those rights is held to be exclusive.

3. In the third place and finally, if the functions and purpose of the Railroad Adjustment Board are conceived to be as they are described by the defendants and discussed in the immediately preceding section of this brief (pages 31-35, *supra*), they present differences so marked from the quasi judicial characteristics of the Interstate Commerce Commission and of the Department of Agriculture under the Packers and Stockyards Act that no analogy can be drawn between the two.

As to each of these points in turn:

1. The rule that in certain classes of cases under the reparations provisions of the Interstate Commerce Act the remedy through the Commission is exclusive and that the courts are without jurisdiction to entertain an independent proceeding derives from *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907) where a shipper, without first proceeding before the Commission, brought suit to recover from a carrier the amount by which he claimed that certain rates which he had been compelled to pay were unjust, discriminatory and unduly preferential. The Supreme Court held that such a suit would not lie because the purpose of the Interstate Commerce Act was to maintain uniformity and prevent discrimination in rates, and that this result would be directly defeated if separate juries

in individual cases were to be entitled to say what was a reasonable rate, thereby destroying the uniformity which the Act sought to establish by forbidding carriers to depart from the rate published in their tariffs and filed with the Commission. The court also pointed out that the right to a reasonable and non-discriminatory rate in its present form derives from the Act to regulate commerce, in view of the doubt as to the existence and scope of such a right at common law before the Act to regulate commerce was enacted (page 439).

Subsequent to the decision in the *Abilene Oil Co.* case, it was contended that under the rule there laid down a shipper was no longer in any case free to institute an original proceeding in the courts to recover charges alleged to have been improperly exacted by a carrier without having first applied to the Commission. This contention was advanced in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), where a shipper sued a carrier to recover an amount alleged to have been exacted in violation of the carrier's tariff. The case turned wholly on the proper interpretation of the tariff and to that extent upon whether or not the carrier had complied with the provisions of the Interstate Commerce Act in charging a rate different from its duly published rate. The Supreme Court held that the action might be maintained and that it was not necessary for the shipper to seek his remedy through the Commission. The court distinguished the cases falling within the rule of the *Abilene Oil Co.* decision by narrowing the application of that rule to controversies over the alleged unreasonable and discriminatory character of a rate, as to which separate decisions by the courts in individual controversies could not avoid the result of destroying the uniformity of rates which it was the purpose of the Act to

establish. Here, on the other hand, the controversy was essentially as to the proper construction of a contract. It was therefore held that preliminary resort to the Commission was unnecessary since such construction was not a matter calling for uniformity of decisions or for the exercise of administrative discretion.

It may be noted in passing that in the instant case, as in the case just cited, the issue is also solely as to the construction of a contract and since under the language of the Interstate Commerce Act controversies of this character may form the basis of an original application to the courts without preliminary resort to administrative determination, it seems clearly to follow that the use of analogous language in the Railway Labor Act requires a similar result.

2. It was noted above that the Supreme Court in its opinion in the *Abilene Oil Co.* case pointed out that at the time of the enactment of the Act to regulate commerce the right of a shipper to recover at common law for discrimination in the rates which he was charged by a carrier was doubtful and uncertain, and that this right was established by the Commerce Act. In the subsequent case of *Mitchell Coal Co.* v. *Pennsylvania Railroad Co.*, 230 U. S. 247 (1913), where the rule of the *Abilene Oil Co.* case was followed, the Supreme Court said:

> "It is urged that a claim based upon the unreasonableness of past rates raises a judicial question of which the courts and not the Commission have jurisdiction. There are several answers to this proposition. In the first place, the plaintiff cannot claim under the Act and against it. To say the least, it is extremely doubtful whether at common law one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered

> to th carrier. (sic) But if any such right existed, it was abrogated or forbidden by the Commerce Act, and one was given which as a condition of the right to recover required a finding by the Commission that the allowance was unreasonable and operated as an unjust discrimination or an undue preference."

From this language, it seems entirely clear that the effect of the Act to regulate commerce was to abolish certain pre-existing common law rights if such in fact existed, and to establish in lieu thereof new rights originating from the Act and which therefore under the rule stated above at pages 12-17 must be enforced according to the procedure prescribed by the Statute establishing them. As already emphasized no such situation exists in the instant case. Here the plaintiff is not seeking to enforce rights derived from the Railway Labor Act, but on the contrary to obtain a judicial declaration of rights arising under a contract at common law. Clearly, therefore, if the decisions under the Commerce Act are relevant, the instant case falls within the class of controversies covered by *Great Northern Railway Co.* v. *Merchants Elevator Co., supra,* rather than under the cases governed by the *Abilene Oil Co.* decision.

3. Finally, if the defendants' exposition of the character and function of the National Railroad Adjustment Board discussed above at pages 27-35 is assumed for purposes of argument to be correct, it establishes the widest possible distinction between that agency, its composition, procedure and purposes on the one hand, and a quasi-judicial administrative tribunal, like the Interstate Commerce Commission, on the other, which in reparation proceedings acts for the purpose of determining the rights of the parties before it and

not for the purpose of re-adjusting their rights as the defendants claim it is the function of the National Railroad Adjustment Board to do. There is, of course, further difference in respect of the form of procedure followed by the two agencies. The Interstate Commerce Commission in reparation proceedings acts only after notice and hearing and is required by statute and court decisions to take testimony, permit cross-examination and arrive at a judicial determination. On the other hand, the procedure of the Adjustment Board, as described in the allegations of plaintiff's complaint, paragraphs 20-27, inclusive, is totally wanting in all the requirements of a judicial hearing. See especially Exhibit "E" to the Complaint. It seems entirely clear that a body acting under the non-judicial procedure there described cannot be regarded as in any way entitled to hold the same place or perform the same functions in respect of the adjudication of rights as that which is held by the Interstate Commerce Commission in the class of cases represented by the *Abilene Oil Co.* decision.

II.

PLAINTIFF IS NOT PRECLUDED FROM MAINTAINING THIS SUIT BY REASON OF THE FACT THAT THE ISSUES INVOLVED IN THE PRESENT CONTROVERSY HAVE BEEN SUBMITTED TO THE NATIONAL RAILROAD ADJUSTMENT BOARD BY A LABOR ORGANIZATION REPRESENTING THE DEFENDANTS AND THAT AS A RESULT OF SUCH SUBMISSION THE BOARD HAS MADE A PURPORTED AWARD AND ORDER THEREON.

Defendants contend that this court is without jurisdiction to render a declaratory judgment in the instant case because to do so would, according to their contention, amount to a "review" of the award previously

handed down by the National Railroad Adjustment Board (for the "award" see Complaint, paragraphs 26, 27), and they urge that "a declaratory judgment will not be granted as a means of reviewing the decision of another tribunal" (Defendants' memorandum brief, page 45). In support of this contention, defendants cite (pages 46-48) cases holding that under the Declaratory Judgments Act proceedings may not be maintained for a declaration of rights already adjudicated by another judicial court of co-ordinate jurisdiction.

Plainly there is inconsistency between this contention and the contention of the defendants already considered that not merely is the National Railroad Adjustment Board not a court, but that it does not act judicially or even act to adjudicate rights. If the view of defendants is sound as to the function of the Adjustment Board and the nature of its action in adjusting disputes by the substitution of new rights and obligations for existing ones, then it seems clear that its awards are not judgments or adjudications of right in such sense as to bring them within the protection of the rule that rights already adjudicated will not subsequently be re-examined in declaratory judgment proceedings.

Assuming, however, that the defendants are in error in their view of the nature and functions of the Adjustment Board, and that it is in fact required by Section 3(i) of the Railway Labor Act to base its awards upon the existing contract rights of the parties, it by no means follows that the bare fact of its having made such an award precludes those rights from being examined in a proper case in the course of a proceeding in the ordinary judicial courts, including a proceeding for a declaratory judgment.

This follows, first, from the nature and character of awards by the Adjustment Board; secondly, from the relation in which the instant proceeding stands to the award here involved; third, from what the Adjustment Board attempted to do by that award; fourth, from the nature of the Adjustment Board as a tribunal; and, fifth, from the procedure followed by the Board in arriving at its award.

1. With regard to the nature and character of awards and orders of the Adjustment Board, defendants not merely admit but assert (Memorandum brief, page 53) that "the order has no substantive effect and is in itself unenforceable." They further assert (page 54) that "the order establishes no rights"; and also (page 53) that "the plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued." Again they say (page 70) that "the power to enter binding decrees and orders" is "a power not possessed by the National Railroad Adjustment Board." Defendants find a basis for these contentions (Memorandum brief, page 53) in the fact that under Section 3(p) of the Railway Labor Act, in a suit brought by the employes, the order or award has no further effect than as "prima facie evidence of the facts therein stated." This conclusion would appear to be sound, and defendants are accordingly correct in stating that the existence of the order merely assists the party in whose favor the order was issued to prepare and prove his case in court if he should elect to bring an action against the carrier under Section 3(p) of the Act. An order or award of this character having only evidentiary effect is obviously not such a determination of rights as to come within the protection of the rule that

the declaratory judgment procedure is not available to examine rights which have already been determined by another court of competent jurisdiction. Such determination by another court must clearly be a final determination operating to declare and fix the rights of the parties, and not a mere declaration capable of being used as evidence in the event that a suit should at some time be brought by one of the parties. The lack of final and compulsive effect in the awards of the Adjustment Board, and the fact that under the statute they are intended as merely preparatory to private proceedings which may be brought by one of the parties in his discretion, serve to differentiate them from the entire class of administrative orders and determinations, like rate-fixing orders of the Interstate Commerce Commission and cease-and-desist orders of the Federal Trade Commission, which have an immediate and coercive effect in fixing the subsequent rights and powers of persons subject to the regulatory statute which authorizes the order.

2. In the second place, it is to be noted that the present proceeding is not one for review of the award of the Adjustment Board. As already pointed out, and as admitted by the defendants, this is a proceeding for a declaration of the contract rights of the parties under their agreement of 1923 and the award is involved only incidentally. Neither plaintiff nor defendants (see defendants' memorandum brief, pages 53-54) claim or assert any rights under the award. The award is recited in plaintiff's complaint for the two-fold reason of making full disclosure to this court and because it has operated as a factor in the demands for money payments now being made upon the plaintiff by the defendants. While the award of the Adjustment Board does

not create or affect the rights in controversy, and while it might, therefore, have been ignored in the pleadings, it is nevertheless true that the fact of its having been made has stimulated and is stimulating the demands made by defendants which plaintiff seeks in this proceeding to have adjudicated.

If, as both plaintiff and defendants contend, the award is not the source of the rights before this court for adjudication and has not legally affected those rights, it seems clear that the plaintiff's right to maintain the instant proceeding is not in any way affected by the effect which a decision here may have upon the award. The fact that the award is involved in such a way that a decision in this proceeding may be said to amount to a "review" of the award is without significance, and accordingly defendants' contention that a declaratory judgment will not be granted as a means of reviewing the decision of another tribunal is without merit, even assuming that the Board of Adjustment is a "tribunal" within the meaning of the principle relied on.

However, if both plaintiff and defendants are wrong in the view they take of the nature and effect of an award by the Adjustment Board, and even if that award amounts to an attempted adjudication by the Board of the contract rights of the parties, it is nevertheless within the jurisdiction of this court to entertain the instant proceeding because in that event, on the case made out by the complaint, the purported award of the Board must be disregarded as void and of no effect since it exceeds the statutory authority of the Board.

3. It appears from the complaint that what the Adjustment Board attempted to do by its award was not

to construe and apply the existing contract between the parties, but rather, in the words of the defendants' memorandum brief (page 67), "to adjust the dispute in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction," or, in other words, in a manner which in the arbitrary opinion of the Board was likely to be conducive to that end. If, as defendants contend, the Board in making a decision of this character was acting within its statutory power, then, as defendants admit, its decision was not an adjudication and there is no possible objection to the adjudication of the parties' rights in the present proceeding on the ground that a decision here would amount to a review of a prior adjudication. If, on the other hand, it was not within the statutory power of the Board to go beyond an adjudication of the contract rights of the parties and to substitute for such adjudication an adjustment of future rights and obligations in its own discretion, then the Board by making the award which it has made and thereby imposing a new contract on the parties has plainly exceeded its statutory power with the result that its award is void and under well settled principles of law may be disregarded in the present proceeding.

There is no more fundamental principle of our legal system than that administrative decisions which affect private rights must be subject to re-examination in a judicial court for error of law. In the words of Mr. Justice Brandeis in a recent case:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied [by an administrative tribunal]" (*St. Josephs Stockyards Co.* v. *United States*, 298 U. S. 38, 56 Sup. Ct. 720 (1936), at 84).

This is particularly true where the error of law goes to the jurisdiction of the administrative body and hence to its power to act. If an administrative body were to be immune from judicial examination of its decisions of legal questions, it could obviously by erroneous decisions of such questions arrogate to itself powers of action not committed by the statute which is the sole source of its authority. To prevent such a result and provide a means of properly confining administrative action within the limits to which it was meant to be confined by the legislature, the courts have always permitted judicial re-examination of administrative decisions on those points of law as to which an erroneous decision by the administrative agency might result in expanding the authority of the agency beyond the limits prescribed for it by the legislature.

If the award of the Adjustment Board should be held by this court, contrary to the contention of both plaintiff and defendants, to be an administrative determination judicial in character, and if by that determination the Board has so construed the Railway Labor Act as to permit it to impose a new contract on the parties or has so misconstrued the legal effect of the contract between the parties as to convert it into a new contract, then the Board has plainly exceeded the powers conferred upon it by Congress and the plaintiff is entitled to a judicial examination of the issues made by the complaint to determine whether the Board has done so.

Among the many cases illustrating this principle, three may be selected for example.

In *Gegiow* v. *Uhl*, 239 U. S. 3 (1915), the Secretary of Labor was authorized by statute to exclude immi-

grants who were likely to become public charges. The Secretary excluded the petitioners on the ground that they were destined for Portland, Oregon, a place where the labor market was over-stocked and where it would be impossible for them to obtain employment. The Supreme Court held the immigrants entitled to enter on the ground that an alien is not likely to become a public charge within the meaning of the statute merely because the labor market in the city of his immediate destination is overstocked. The statute made the decision of the immigration officials conclusive upon matters of fact. The court held, that this conclusiveness did not attach to a construction of law wherein the error of the officials might result in their exercising authority to exclude persons lawfully entitled to enter the United States.

Again, in *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433 (1911), the Commission refused to permit a carrier to increase certain rates on the ground that to do so would adversely affect the lumber industry of the Willamette Valley, although there was no other ground for holding the increased rate unreasonable. The carrier attacked the rate, contending, in the words of the Supreme Court, that "although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of re-

viewing and correcting an abuse of power" (Opinion, page 443). The Supreme Court held the order invalid, saying that "it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time, to a just and reasonable charge for the service rendered for the future" (Opinion, page 449).

In *Waite* v. *Macy*, 246 U. S. 606 (1918), the United States Tea Board had statutory authority to exclude tea inferior to certain standards. The court excluded certain tea containing a minute percentage of coloring matter admitted to be harmless in character although the standard permitted a much greater amount of other impurities. The importer claimed that by this action the Board was attempting to apply criteria outside of those prescribed by law. The Supreme Court sustained an injunction against the Board, saying in an opinion by Mr. Justice Holmes:

> "No doubt it is true that this court cannot displace the judgment of the Board in any matter within its jurisdiction, but it is equally true that the Board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption" (Opinion, pages 608-609).

Statutory procedure is generally provided for the review of administrative determinations which affect private interests. The absence of such procedure, however, is no bar to review where necessary to restrain administrative authority within its proper bounds, and where no procedure is provided it will be devised by

the courts. The most recent illustration is *Shields* v. *Utah-Idaho Central R. R. Co.*, decided by the Supreme Court, December 5, 1938 (59 Supreme Court Reporter, Advance Sheets, page 160). There the Interstate Commerce Commission had purported to exercise authority granted it by statute to determine whether any railway line operated by electric power was an interurban electric railway exempted from the operation of the Railway Labor Act. The Supreme Court had previously held that such a determination by the Commission was not within the statutory review procedure provided by the Urgent Deficiencies Act of October 22, 1913 (*Shannahan* v. *United States*, 303 U. S. 596). The court went on to say:

> "We have not held that the determination of the Commission was not subject to judicial review by other procedure. . . . The nature of the determination points to the propriety of judicial review. . . . Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted even though the complaint seeks to enjoin the bringing of criminal actions. . . . In the circumstances we think respondent was entitled to resort to equity to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status."

For other cases to the same effect, see *United States* v. *Griffin*, 303 U. S. 226, 58 Sup. Ct. 601 (1938); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908).

Where essential to protect against usurpation of administrative power in excess of statutory authority arising out of administrative error with respect to questions of law, the review may take place in a collateral proceeding in spite of the general rule that col-

lateral attack is not permissible against judgments of a tribunal acting properly within its jurisdiction. The *Shields Case*, cited above, is squarely in point. There the challenged determination had been made by the Interstate Commerce Commission. The effect of the determination, however, was to bring into play certain provisions of the Railway Labor Act administered by the so-called Mediation Board. Disobedience of these provisions was made punishable at the suit of the appropriate United States District Attorney. The plaintiff accordingly brought its bill against the District Attorney although the point in issue was the validity of a determination by the Interstate Commerce Commission. The effect of the proceeding was accordingly to attack the Commission's determination collaterally. But so little was this held to constitute a bar to the action that the point was not even raised. The court squarely held that the determination of the Commission was appropriately subject to review in the form of proceeding adopted.

Collateral attack has been the usual and not the exceptional method of reviewing determinations of the United States Land Office whereby as a result of error of law the land officials have patented to one party land which lawfully belonged to another. In such cases, the issue of title has been tried in ejectment proceedings between the parties. See *Burfenning* v. *Chicago, St. Paul, Minn. & Omaha R. Co.*, 163 U. S. 321 (1896).

In the case at bar no review procedure is provided for awards of the Railroad Adjustment Board. Defendants correctly assert that the statutory suit which employes are authorized to bring under Section 3(p) of the Railway Labor Act is not a review proceeding since under the statute the award has no further effect than

as *prima facie* evidence of facts and the suit is upon the employe's rights under his contract. Accordingly, if the award has any standing at all as the determination of an administrative tribunal so as to raise any issue of review in the instant proceeding, it is a determination for which no statutory review is provided and which accordingly stands in substantially the same position as the determination of the Interstate Commerce Commission in the *Shields Case, supra.* In that case the Supreme Court upheld a form of procedure specially devised for no other purpose than to make a collateral attack upon the determination.

In the instant case, plaintiff seeks to employ a regular and normal form of procedure in a type of case for which that procedure is intended, viz., the interpretation of contract rights. There would be no question as to its propriety, in the absence of the Adjustment Board's award. Defendants contend, however, that plaintiff is barred from the use of this otherwise appropriate form of procedure simply because its use would affect the award collaterally. It seems clear that this argument is without merit in the light of the decision in the *Shields Case, supra,* that a proceeding may be maintained for the express purpose of making a collateral attack upon an administrative determination.

4. In all that has so far been said, it has been assumed that the National Railroad Adjustment Board is a tribunal of the class whose determinations and orders if of a properly judicial character come within the rule that they may not subsequently be re-examined if made within the tribunal's statutory jurisdiction. The tribunals to which this principle has been hitherto applied have always been and must necessarily be official governmental bodies like the Interstate Commerce

Commission, the Federal Trade Commission, the General Land Office, and the like. The National Railroad Adjustment Board by its composition differs essentially from such a tribunal. Attention has already been called to the fact that its members are appointed not by public governmental authority but by private agencies, viz., the carriers and the labor organizations (Section 3, First, (a), see *supra* page 31). The Railway Labor Act provides that the carriers, each acting through its board of directors or its receiver or trustee, or through an officer designated for that purpose by such board, receiver or trustee, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board. Similarly, the national labor organizations, acting each through the chief executive or other medium designated by the organization, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected, and shall select such members (Section 3, First, (b) and (c)). Furthermore, the members of the Adjustment Board are not paid out of the public Treasury. "Each member of the Adjustment Board shall be compensated by the party or parties he is to represent" (Section 3, First, (g)). Surely this is an altogether different type of agency from a public regulatory body like the Interstate Commerce Commission. The question may at once be raised whether it would be within the constitutional power of Congress to confer on a body designated and compensated by those subject to its jurisdiction any authority to render legally binding adjudication as to rights.

The point would seem to be fully covered by what the Supreme Court has said in *Carter* v. *Carter Coal*

Co., 298 U. S. 238, 56 Sup. Ct. 855 (1936), at 311-312, although there the court was speaking of the delegation of quasi-legislative rather than quasi-judicial powers to the representatives of private interests. The court said:

> "The effect . . . is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act . . . The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is . . . delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property."

Clearly, these considerations apply to the exercise of judicial no less than of legislative power and would operate to render unconstitutional any attempt by Congress to vest the determinations of the National Railroad Adjustment Board with the degree of conclusiveness against attack in the courts which is enjoyed by determinations of such bodies as the Interstate Commerce Commission, the Federal Trade Commission, and the Utilities Commissions and Workmen's Compensation Boards of the States.

5. Lastly, the National Railroad Adjustment Board because of the procedure under which it acts is not entitled to be regarded as a tribunal whose adjudications may not be subsequently re-examined in the judicial

courts. That procedure as applied in the proceeding before the Board which resulted in the award involved in the instant case is fully described in paragraphs 19-27, inclusive, of the complaint. It is there stated that representatives of the plaintiff's employes, including the defendants, invited the plaintiff to join with them in the submission of their claim to the National Railroad Adjustment Board, which plaintiff declined to do on the ground that said claim amounted to a demand that operating practices should be abandoned which had existed continuously since the commencement of operation of the Terminal and that said claim was not based on any violation of any agreement. Thereafter, the representatives of the employes filed a claim with the National Railroad Adjustment Board, First Division, and the Board notified the plaintiff to file its answer within thirty days and set a date for the appearance of the plaintiff and representatives of the employes. On said date, when representatives of the plaintiff and the employes appeared before the Board at Chicago, no witnesses were called to testify, no evidence was produced of the facts relied on by the representatives of the employes to support their claim, but ex parte statements were made and received by the Board without any opportunity for cross-examination to test the competence of the statements. This was in accord with the established procedure of the Board. That procedure affords no opportunity to parties against whom claims have been filed to produce witnesses or by other means to introduce evidence, and since no evidence is introduced there is no opportunity for cross-examination. No record, stenographic or otherwise, is made of the "hearing." Exhibit "F" to the complaint sets forth resolutions of the Board to the effect that when a claim has been filed, the other

party is required to answer without seeing the submission of his adversary which includes the statement of claim, and also to the effect that after the two submissions have been filed, neither party may add anything thereto prior to the date of hearing and may not at the hearing present any matters not incorporated in the submissions. Attention is called especially to the following sentence from the resolution of April 27, 1937:

> "Introduction of evidence at the hearing is foreclosed" (Complaint, page 42).

It should at once be clear how completely this procedure is wanting in the requirements of a quasi-judicial hearing.

In the first place, the party who is called upon to answer is not permitted to see the submission which contains the statement of the claim which he is to answer.

In the second place, no evidence is permitted to be introduced at the hearing.

If the matters stated in the submissions are to be regarded as evidence, no opportunity is given to cross-examine or otherwise test such evidence. The resolutions of the Board require that the answering submission must be filed before the defendant sees the submission of his adversary.

Furthermore, in cases in which, as in the one here involved, the Board is unable to reach its own decision but refers the case to a referee, not merely does the referee hear no evidence and have before him no evidence save the "submissions" of the parties, but he does not hear argument by the parties or even receive written argument from the parties. The only argument which he hears is argument which the two factions of the Board, viz. the employer's representatives

and the employes' representatives, may care to place before him (Complaint, paragraph 25).

In the words of the defendants' memorandum brief (page 21): "If the regular members are unable to reach an agreement a neutral referee is called in to sit and vote with them for the purpose of breaking the deadlock. If such referee is selected, the Board then adopts a quasi-judicial formula of procedure. The members then become adversaries indeed and actively urge their respective views upon the referee to whom their differences are, in effect, submitted for decision."

Attention should be called to the wide differences between the method of the procedure above described and the requirements of judicial procedure as carefully outlined in a recent opinion of the Supreme Court.

In *Morgan* v. *United States*, 298 U. S. 468, 56 Sup. Ct. 906 (1936), at 480, the court said:

> "There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. . . . A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi judicial* character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.

> The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

In the light of the requirements thus laid down, it seems plain that the proceedings before the National Railroad Adjustment Board cannot lay claim to be quasi-judicial proceedings in any sense, and if they are not, it follows that an award or decision purporting to be a determination of legal rights as a result of such procedure is not within the rule that rights may not be re-examined in court which have already been determined by a tribunal of competent jurisdiction.

III.

Defendants and Others Occupying a Like Situation Will Not be Deprived of any Legal Rights if it is Held That a Proceeding for a Declaratory Judgment Will Lie in the Instant Case; Whereas if Plaintiff is Denied Relief by Way of the Declaratory Judgment Procedure, it Will be Wholly Deprived of Judicial Protection of Its Contract Rights and Exposed to Serious and Increasing Hardships and Losses.

Defendants in their memorandum brief (pages 37-43) take the position that if plaintiff is permitted to maintain the present suit, defendants will be deprived

of certain rights which are assured to them by law. This proposition is sought to be established in the following manner:

Defendants in the first place assume that the ordinary jurisdiction of the courts at law and in equity is ousted by the special procedure set up under the Railway Labor Act. The error in this contention has already been pointed out above under the first main heading of this brief, pages 6-41. Assuming, however, for the purpose of argument that the defendants' contention is sound in this respect, it follows that under the procedure of the Railway Labor Act access to the courts can only be obtained under Section 3 (p) of the Act. That section, as already noted, provides that if a claim of an employe has been sustained by the National Railroad Adjustment Board the employe may then bring a suit on the claim in a Federal District Court for the district in which he resides, or in which is located the principal office of the carrier, or through which the carrier operates. It is further provided that such a suit may be brought at any time within two years from the date of the award of the Adjustment Board (Section 3, First, (q)). In such a suit the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal, but such costs shall be paid out of the appropriation for the expenses of the Courts of the United States. If the petitioner shall finally prevail, he shall be allowed a reasonable attorneys fee to be taxed and collected as part of the costs of the suit (Section 3, First, (p)).

Defendants contend that if in fact the ordinary jurisdiction of the courts is not ousted by the procedure under the Railway Labor Act the defendants will be

deprived of the special legal advantages under the provisions of the Act just recited accruing to employes whose claim has been sustained by the Adjustment Board, viz.:

1. The advantage of a right of selection of the forum in which the suit is to be brought as between the relatively wide range of districts specified in the Act;

2. The advantage of waiting for an interval of two years before the case is submitted to a court;

3. The advantage of not having to pay costs in the district court if they lose; and

4. The advantage of recovering attorneys fees if they win.

Defendants contend that if it is held that a proceeding like the present may be maintained under the general jurisdiction of the courts employes whose claims are sustained by the Adjustment Board will be deprived of the foregoing advantages.

If this contention is sound it would operate to exclude the declaratory judgment procedure not merely in a case like the present but in a large number of other cases to which it is admittedly applicable.

Take, for example, in the first place, the matter of the selection of a forum. Suppose that A, a resident of State X, has a contract with B, a resident of State Y, and makes a claim under the contract against B which B does not admit, so that a controversy arises. Under the Federal venue statute (Judicial Code, Paragraph 51, 28 U. S. C. A., Paragraph 112) A has an election to sue B in the District Court of either State X or State Y. Since A fails to sue, B brings a proceeding for a declaratory judgment of his rights

under the contract in the District Court of State X. B by bringing the proceeding necessarily selects the forum and to that extent deprives A of the right of selection which A would have in the event that A were plaintiff. Thus necessarily the Declaratory Judgments Act by empowering one who would be a defendant at the suit of A to put himself in the position of a plaintiff cuts off the right of electing the forum which would otherwise accrue to A as plaintiff. If this is an objection to the applicability of the declaratory judgment procedure, it must apply to that procedure generally, and if it does not apply to that procedure generally, then defendants here cannot take advantage of it by reason of the special venue provisions of the Railway Labor Act unless the remedy by way of the Railway Labor Act has been expressly made exclusive by Congress, in which event there would be no necessity to resort to the objection in question.

The same thing is true with regard to the statute of limitations. Defendants take the position that because by Section 3, First, (q) of the Railway Labor Act, an employe whose claim has been sustained by the Adjustment Board has two years within which to bring the statutory proceeding in a district court provided for by Section 3, First, (p), he is protected and guaranteed against a proceeding in court for a two-year period. To construe statutes of limitations in this way as guarantees of freedom from litigation would obviously destroy the declaratory judgment procedure altogether. If, for example, A makes a claim on a written instrument against B of such character that A would have six years within which to bring action against B, and B, to set the claim at rest, brings a declaratory judgment proceeding within six months, B has clearly forced A into court more than five years

before A might have chosen to come on his own initiative. If the six-year statute of limitations guarantees A a right to stay out of court for that entire period and still insist on his legal rights, it is clear that B's action in bringing the declaratory judgment deprives A of this right. Clearly this is not the law. If it were the law, a potential plaintiff could always prevent a potential defendant from protecting himself by application for a declaratory judgment.

With respect to the relief of the defendants from costs and with respect to their rights to attorneys fees in the statutory proceeding under Section 3, First, (p), the right of the plaintiff to maintain the present suit cannot be construed as in any sense an interference. If the defendants had chosen to bring a statutory suit under Section 3, First, (p), they would have been entitled to all the benefits conferred by that section with respect to costs and attorneys fees. The right of a potential defendant to bring a proceeding for a declaratory judgment in no way destroys the right of the potential plaintiff to sue in whatever forms of action are available to him. It merely operates to make the potential plaintiff make up his mind more quickly. If he does not do so and the potential defendant anticipates him with a suit for a declaratory judgment, this is no valid objection to the declaratory judgment procedure, or that procedure would be unlawful in *toto*. Every time that a complaint for a declaratory judgment is filed it necessarily cuts off the special advantages which the defendant in the declaratory judgment procedure might have obtained by acting first and suing as plaintiff.

It is also of the essence of the declaratory judgment procedure, as already pointed out, to deprive a poten-

tial plaintiff of whatever special advantages he might seek to obtain by resting inactive upon his rights and thereby continuing to embarrass the defendant. The purpose of the declaratory judgment procedure is to make it possible for the defendant to relieve himself from such embarrassment. Necessarily to do so restricts the power of the potential plaintiff to embarrass the defendant and in the last analysis this is the complaint of the defendants in the instant case. As they construe the Railway Labor Act, it confers upon them certain powers of embarrassment. As they put it, "it makes resort to the courts unattractive to the carriers" (Defendants' memorandum brief, page 38),—in the first place, by closing the doors to the carriers altogether for review of an unfavorable award by the Adjustment Board and, secondly, by giving to the employes an option of waiting two years to sue the carrier if they wish to sue at all, and in the meanwhile resorting to what the defendants call their "collective economic bargaining power" (Defendants' memorandum brief, page 37), which means their threat to strike. If, as defendants contend, the statutory procedure which is characterized by these results is exclusive, it follows that the carriers are effectively deprived of recourse to the courts for the protection of their contract rights.

In short, the scheme of procedure which defendants contend has been established by law as a result of the Railway Labor Act is nothing else than this: if a carrier has a contract with a group of employes and if thereafter the employes make claims which are not supported by the contract, the employes can against the will of the carrier take the case to the National Railroad Adjustment Board. The Adjustment Board is

then free either to dictate by way of adjustment a new contract for the parties as defendants contend, or else at least in the guise of construing the contract to do so in such a way as in effect to write a new contract. After it has done this by its award, the courts are closed to the carrier and the employes may wait two years before electing to come into court if they ever elect to do so at all. In the meantime, with an outstanding award of the Adjustment Board in their favor, they are in a position to use against the carrier their "collective economic bargaining power" and thereby place the carrier in the position of resisting what purports to be a lawful award by a publicly constituted body. The whole objective of the scheme as outlined in the defendants' memorandum brief is clearly to eliminate effective resort to the courts for the determination of legal rights under contracts between carriers and their employees. If the scheme is as defendants contend an exclusive one, plaintiff submits that it is destructive of the contract rights of the carriers. Defendants apparently argue that the scheme should be held to be exclusive in order to preserve and protect those very features of it which would enable it to destroy the rights of the plaintiff under its contracts. Plaintiff submits that this argument is without merit. It consists of constructing on a hypothetical basis a scheme of procedure which would be grossly unfair and inequitable and then arguing that in order to safeguard and maintain this inequitable procedure the plaintiff should be denied its rights of resort to the judicial courts under the Declaratory Judgment procedure to which it is plainly entitled under all the decided cases and under the principles which they em-

body as pointed out in the two first sections of this brief.

Not merely would the defendants not be deprived of any legal right to which they are entitled if it is held that this proceeding for a declaratory judgment may be maintained but, on the contrary, if it is not so held, the plaintiff will be clearly deprived of a judicial remedy on its contracts with its employees and, in effect, those contracts will be reduced to mere scraps of paper

Aside from the immediate embarrassment to which plaintiff is being daily subjected by the accrual of demands for penalty payments by the defendants, as set out in paragraph 29 of its complaint, it would also in practical effect be denied the opportunity of having determined, once and for all, whether its duties under the agreement of 1923 are as a matter of law what it claims they are, or whether they are the different and additional duties which have been imposed by the award of the Adjustment Board, and on the basis of which the demands for money payments now being made by the defendants are put forward. It seems entirely clear from defendants' brief that they have no intention of bringing that question to a judicial determination and that in fact they conceive the purpose of the Railway Labor Act to prevent the adjudication of such questions in the court. Their brief is rich in expressions of suspicion and dislike of court procedure. They say:

> " * * * It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment

of cordial relationships between the parties in the future." (Defendants' memorandum brief, pages 66 to 67)

They further say, speaking of a procedure under which the employers would be entitled to resort to court:

> "* * * the employees would go before the Board with everything to lose and absolutely nothing to gain. It can hardly be doubted that the result would be an increasing unwillingness on the part of the employees to submit disputes to the Board and an increasing resort by them to the familiar weapons of industrial warfare as a means of securing adjustments of their disputes. * * *" (Defendants' memorandum brief, page 43)

On the other hand, as already pointed out, they take the position:

> "* * * The orders of the Board find their primary sanction in the collective economic bargaining power of the employes. * * *" (Defendants' memorandum brief, page 37)

Reading these statements together they apparently mean that the employes will consent to go before the Board if it is understood that they are in a position to enforce the orders of the Board by their right to strike; but that if, on the other hand, a way is open through the courts to obtain a judicial determination of the rights of the carriers as well as of the employes, then the employes will not go before the Board at all, but will resort to the right to strike in the first instance. This amounts to saying that in either instance; *i. e.*, whether the procedure before the Board is or is not resorted to, the employes insist that their claims against the carriers, whether founded in contract or not, extend

exactly so far as their collective economic bargaining power can make them extend. If that view is accepted, it follows that contracts between carriers and employes mean only what the collective economic bargaining power of the employes can make them mean. On that view such contracts are scraps of paper.

Plaintiff submits that its right to maintain the present action can only be denied by acceptance of the theory that contracts between a carrier and its employes are not, in contemplation of law, contracts at all. If this action will not lie plaintiff will be denied whatever rights and advantages it may have under the agreement of 1923. If, in law, it is entitled to any rights and advantages under that agreement, its right to maintain the present proceeding must be sustained.

Respectfully submitted,

SYDNEY R. PRINCE, JR.,
15th & K Streets, N. W.,
Washington, D. C.

GUY W. KNIGHT,
1740 Broad St. Station Bldg.,
Philadelphia, Pa.

JOHN DICKINSON,
1740 Broad St. Station Bldg.,
Philadelphia, Pa.
Attorneys for Plaintiff.

Washington, D. C.
April 11, 1939.

Service on defendants of the foregoing Points and Authorities this 11th day of April, 1939, is hereby acknowledged.

William E Willis

.....

FRANK L. MULHOLLAND,
WILLIAM E. WILLIS,
Attorneys for Defendants.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action

File No. 1165

THE WASHINGTON TERMINAL COMPANY, *Plaintiff*,

vs.

F. E. BOSWELL ET AL., *Defendants.*

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES

Filed May 11, 1939

FRANK L. MULHOLLAND,
1041 Nicholas Bldg., Toledo, Ohio,
CLARENCE M. MULHOLLAND,
1041 Nicholas Bldg., Toledo, Ohio,
WILLARD H. McEWEN,
1041 Nicholas Bldg., Toledo, Ohio,
HAROLD C. HEISS,
Keith Bldg., Cleveland, Ohio,
RUSSELL B. DAY,
Keith Bldg., Cleveland, Ohio,
WILLIAM E. WILLIS,
Kellogg Bldg., Washington, D. C.,
Attorneys for Defendants.

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Filed May 11, 1939

GENERAL APPRAISAL OF PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES

Before replying to the arguments contained in the plaintiff's memorandum it is well to note the effect of this memorandum in narrowing the issues of the case. In its complaint the plaintiff indicated that it might assert that the Railway Labor Act embodied an un-

constitutional delegation of judicial power to the National Railroad Adjustment Board. Accordingly a considerable portion of the defendants' original memorandum brief was devoted to a consideration of that question. By its failure to answer this argument in its own memorandum, we conclude that the plaintiff has abandoned the point. Further, in our original memorandum we argued that if the complaint stated no cause of action for declaratory judgment, it stated no cause of action at all. This is conceded by the plaintiff on page 1 of its memorandum, and accordingly no longer forms an issue in the case.

It appears, therefcre, that the determination of this case depends on the single issue of the propriety of granting relief by declaratory judgment. In our principal brief we presented to the court three reasons why this is not a case appropriate for such relief. These reasons as they were stated are as follows:

I. A Declaratory Judgment will not be granted as a substitute for another remedy prescribed by statute for the particular type of case.

II. A Declaratory Judgment will not be granted as a means of reviewing the decision of another tribunal.

III. A Declalatory Judgment passing upon the validity of an administrative order will not be granted where the plaintiff is not imperiled by the order.

In its answer brief plaintiff has revealed a misapprehension of the nature of these arguments. This misapprehension has been so complete as to have led the plaintiff to repeatedly attribute to the defendants' admissions, arguments and statements of position

which, were they to be allowed to pass unchallenged, might well give rise to a distorted view of the defendants' case.

In addition to this misapprehension, or perhaps because of it, the plaintiff's memorandum fails in large measure to even meet the defendants' arguments, and certainly fails to answer them. The plaintiff's principal contentions relative to the question of Declaratory Judgments are organized under three headings roughly paralleling the divisions of the defendants' memorandum above noted. From a consideration of both sets of headings it appears that the whole argument falls naturally into three divisions as follows:

I. The effect of special procedure provided by the Railway Labor Act upon the court's jurisdiction to grant a Declaratory Judgment.

II. The right of the court to grant a Declaratory Judgment as a means of judicial review of administrative orders.

III. The effect of the granting of such judgment upon the rights of the parties.

We shall organize the ensuing discussion under the above heads:

REPLY ARGUMENT

I. The Effect of the Special Procedure Provided by the Railway Labor Act Upon the Court's Jurisdiction to Grant a Declaratory Judgment.

We pointed out in our original brief that the Railway Labor Act has established a procedure for the adjustment of disputes between carriers and employees growing out of the interpretation or application of col-

lective agreements between them. We showed that this procedure consisted of two steps: The first, before the National Railroad Adjustment Board, is an administrative step. The second, where a complaint is filed seeking to enforce the Board's order, is a judicial step. This second step is more than an enforcement procedure, but is one also for judicial review, for the court in such an action is specifically authorized to either enforce or set aside the order of the Board.

We further showed from the phraseology of the statute, and from the legislative and administrative history of its provisions, that the relation existing between the administrative and judicial steps provided is so close as to lead to the conclusion that the Congress intended the judicial step to form an essential feature of the whole comprehensive scheme. Otherwise stated, if the administrative process has been invoked and has been pursued to the extent of securing an administrative ruling, the only avenue of approach to the courts for a review of that ruling is through following the statutory procedure which is intended to be exclusive.

This argument has been completely misconstrued by plaintiff. While we have thus attributed an exclusive character to the *judicial* step of the statutory process, it insists we have attributed such character to the *administrative* step. Thus we are placed in the position of having said that Congress intended to oust the courts of jurisdiction to decide all controversies of the type to which the jurisdiction of the National Railroad Adjustment Board attaches. As to the question of whether this was or was not the legis-

lative intent, it is not now necessary to express an opinion. The question may well wait for a case in which it is directly presented.

The defendants are not contending that *any* provision of the Railway Labor Act has *"ousted"* the courts of jurisdiction. We do assert, however, that where the Adjustment Board has made a decision and where the statute has specifically provided the identity of the persons, the time, and the manner whereby the correctness of that decision may be submitted to the courts, that method must be pursued. We do not, therefore, contend that the jurisdiction of the courts has been ousted by the provisions of the Railway Labor Act, but merely that the means of invoking that jurisdiction have been defined.

It follows therefore that a considerable portion of the plaintiff's brief is taken up with a reply to an argument which has never been advanced. In this connection we will consider the various divisions of Section I of the plaintiff's brief in order.

Thus Section IA (pages 8 to 17) is devoted to the citation of cases, which are claimed to support the proposition that carriers or employees may resort to the courts for interpretation of their contract rights instead of resorting to the procedure set up by the Railway Labor Act. With the exception of two, the cases cited involved disputes which had never been submitted to the Adjustment Board at all. These two exceptions (*Nord vs. Griffin*, 86 Fed. (2) 481, and *Lane vs. Union Terminal Company*, 12 Fed. Supp. 204) were brought by *employees* who asserted that their rights had been prejudiced by rulings of the Adjustment

Board in proceedings to which they claimed *they were not parties and of which they had no notice.* The plaintiffs in these actions were neither petitioners before the Adjustment Board, parties for whose benefit the awards of the Board were made, nor carriers. Hence they could neither sue nor be sued pursuant to the provisions of the Railway Labor Act (See Railway Labor Act, Section 3(p) quoted in the appendix to our principal brief, pages 78 to 79), and it was accordingly held that they might invoke the general equity jurisdiction of the courts regardless of the statutory procedure. These cases obviously do not support the proposition that one who is amenable to the statutory procedure may similarly institute an action for review in complete disregard of the provisions of the statute.

Perhaps some or all of the other cases cited by the plaintiff in this section might be relevant in a situation where an award had been neither sought nor issued by the Adjustment Board, and where it was contended that the mere existence of a statutory *administrative* procedure precluded resort to the courts in any case. The cases in question are not relevant to the issue of whether *after an award has been made,* the parties, or either of them, may secure a judicial review of the controversy through means other than those prescribed by statute.

Section IB of plaintiff's memorandum (pages 17 to 20) is based on the same fundamental misconception of the issues. In this section plaintiff states as a premise the conclusion drawn from the preceding section, *i. e.,* that it is not the intent of the Railway Labor Act to oust the courts of general jurisdiction over con-

troversies regarding the interpretation of agreements between carriers and employees. Arguing from this premise it concludes that it is not the intent of the statute to oust the courts of the special jurisdiction conferred by the Declaratory Judgments Act. Even if we concede the correctness of this conclusion it can be applicable no further than is the premise upon which it is based. Hence the plaintiff's argument, if correct, merely concludes that the *administrative* procedure set up by the Railway Labor Act does not prevent a resort to the courts for the purpose of seeking a Declaratory Judgment, but does not establish that the judicial procedure there provided has the same effect. We have already pointed out in our principal brief that it is not the purpose of the Declaratory Judgments Act to provide a substitute for a special remedy made exclusive by statute. We are unable to see how the plaintiff's argument in this connection militates against this conclusion.

Section IC (pages 20 to 27) is devoted to a discussion of the rule that a Declaratory Judgment may not be issued as a substitute for a special statutory remedy and concludes that the rule is applicable only where the statutory proceeding is *exclusive*. This we freely concede. Plaintiff concludes this section of its brief, however, by stating "that the statutory remedy or procedure established by the Railway Labor Act is not of this character, has been made abundantly plain in the two preceding sections of this brief." This conclusion does not follow. What really is "abundantly plain" is the fact that having established to its satisfaction that the administrative remedy provided by

the Railway Labor Act is non-exclusive, the plaintiff is assuming without proof that the statutory procedure for the review of administrative decisions is also non-exclusive.

Section ID of the plaintiff's memorandum (pages 27 to 36) is devoted to a discussion of the policy of the Railway Labor Act and the functions of the Board. In this connection the plaintiff has represented the defendants as contending that it is the function of the National Railroad Adjustment Board in cases of this kind "to substitute new rights and obligations between the parties in place of those which have been created by their contract, and to that extent impose a new contract upon them." (Page 28.) Plaintiff concludes that, if this be true, and if the statutory procedure (by which note it again refers to the *administrative* procedure) is exclusive, then the obligation of the contract between carriers and employees would be destroyed.

This conclusion is based on nothing more substantial than the defendants' argument to the effect that the functions of the National Railroad Adjustment Board are administrative, because, for one thing, it was intended that the Board, when deciding a case involving the present rights of the parties, should give some consideration to the effect of its findings as a means of healing the breach between them. Thus in doubtful cases the Board might take into consideration the desirability of a uniformity of practice on the railroads in certain regards, and might interpret somewhat varying provisions in various agreements as having been intended to express the same thought. This is a consideration involving future relations of

the parties, yet it could not well be argued that, by taking such a factor into account, the Board has made a new agreement for the parties. No doubt similar considerations influence the Board's decisions in other types of situations and properly so. No one ever contended that the Adjustment Board should have the power to deliberately set aside an existing contract and substitute a new one. The defendants certainly have not contended, and do not contend, that the Board has any such authority.

It is true that plaintiff argues in this case that the Board's decision would in effect make a new contract for the parties. However, in every controversy concerning the interpretation of an agreement the losing party always contends that the deciding tribunal either read something into the contract which was not there, or read something out which was there. This, however, is but the stereotyped method of saying the tribunal erred in its decision.

If the National Railroad Adjustment Board erred substantially in this case, that error can have a detrimental effect upon the carrier only if and when proceedings are instituted to enforce the Board's award. In these proceedings, if prejudicial error is shown, the court would be justified in reversing the decision of the Board. The existence of such an error, however, or the existence in the Board of the potentiality of making such errors, does not authorize the court to utilize as a means of correction, a Declaratory Judgment in substitution for the exclusive method of review provided in the Railway Labor Act.

Section IE of the plaintiff's brief (pages 36 to

41) is devoted to a discussion of certain cases which have arisen under the Interstate Commerce Act. The provisions of this statute as to the enforcement and review of reparations orders are substantially the same as those of the Railway Labor Act providing for *enforcement and review* of decisions of the National Railroad Adjustment Board. The plaintiff argues that, inasmuch as it has been held that in some instances reparations claimants are not compelled to invoke the administrative process of the Interstate Commerce Commission, but may take their claims directly to the courts, the same conclusion follows here. This, of course, is another example of the plaintiff's attitude in confusing the administrative processes of these acts and the prescribed provisions for review, from the point of view of their exclusiveness. Without discussing the correctness of the conclusion which has been drawn from these cases, we direct the court's attention to the fact that the plaintiff has cited no case where an administrative decision had been rendered by the Interstate Commerce Commission, and where it was held that the carrier might ignore that decision as well as the statutory means provided for its review, and institute a new action in the courts for a redetermination of the same rights which had been decided by the Interstate Commerce Commission. If such a case existed it might be some authority for the plaintiff's position here. The absence of any such decision, however, affords proof of the exclusive nature of the review provisions contained in the Interstate Commerce Act, and, by analogy, of the similar provisions contained in the Railway Labor Act.

An examination of the entire first section of the plaintiff's memorandum reveals therefore that it has hopelessly confused the administrative machinery established in the Railway Labor Act with the judicial procedure provided for the review of the decisions of the administrative agency created thereby. The real question at issue here relates to the exclusiveness of the *latter*. This the defendants have established in their principal brief, while the plaintiff argues at length that the former is *non-exclusive*—a question which is in no way involved in this case.

II. The Right of the Court to Grant a Declaratory Judgment as a Means of Judicial Review of Administrative Orders.

In the first place in this connection the plaintiff argues that the present proceeding is not one for review of an award of the Adjustment Board. It is asserted that plaintiff's cause of action is founded upon the contract of the parties and that all references to the award of the Board contained in the complaint are really not essential to the cause of action but were inserted merely to make a complete disclosure to the court. In effect, therefore, the plaintiff says that because it asserts rights allegedly based on a contract, the procedure cannot be one for review. This is obviously fallacious. All judicial proceedings (except those involving procedural issues) are based fundamentally on assertions of rights and in every case involving a contract, upon assertions of contract rights. This is true whether the proceeding is one *de novo* or for review. *The nature of the rights asserted* affords

no criterion for determining the *nature of the proceedings*. The true test of whether a proceeding is for review is to be found in the effect which a judgment will have upon the decision of some other tribunal. That the present action is one designed to affect the award and order of the Adjustment Board is shown both by the language of the complaint and by the logic of the situation. The plaintiff on pages 12 and 13 of its complaint prays the court for a judgment "declaring that said Award No. 3115, Docket No. 5059 and Order of the National Railroad Adjustment Board, First Division, entered therein, *did not lawfully confer any right* upon the defendants to perform the work of making such movements, and that said award and order insofar as they purport to confer any such right are *invalid and of no legal force and effect.*" (Emphasis supplied.)

This language is consistent only with proceedings designed to secure a judicial review of the legality and sufficiency of the Board's award and order.

It is apparent that if this action is designed to have any result at all, that result *must* be effective upon the award of the Board. As we have seen such award has certain definite effects upon the procedural rights of the plaintiff as to costs, attorneys fees, statute of limitations and burden of proof, if it is used as the basis of a court procedure for enforcement. If this action is to have no effect upon the Board's award, then regardless of the action of this court, the award can be used as a basis for suit by the employees in the future with all of the advantages to the plaintiff attendant upon such a suit. As we understand it, how-

ever, the specific purpose of this action is to litigate here all issues which might be raised in an action for the enforcement of the award. If the plaintiff were to obtain a favorable judgment from this court on these issues, the only way in which the fruits of its victory might be guaranteed it, would be for this court to *void the award of the Adjustment Board as the basis for any future enforcement action.* Thus it necessarily follows that this proceeding, if it seeks any tangible result at all, seeks a review of the award of the Board.

The plaintiff contends further, however, that even if this action is one seeking a judicial review, it still is entitled to relief by declaratory judgment. It does not in its memorandum controvert the proposition that, in general, a review may not be obtained through resort to the Declaratory Judgments Act, but asserts that this doctrine should be limited to attempted reviews of judicial orders and apparently to certain types of administrative orders possessing a high degree of finality. It is argued, therefore, that awards of the National Railroad Adjustment Board do not come within the general rule of law due to several reasons, *viz.*: (1) The nature of the Board itself, *i.e.*, the fact that it is a tribunal whose members are appointed by private agencies; (2) The nature of the Board's awards, *i.e.*, the lack of the power of enforcement reposing in the Board; (3) The fact that the Board attempted to re make the agreement of the parties (which, as we have seen above, is equivalent of saying the Board committed an error of law in its decision); (4) The fact that the Board in reaching its award followed an allegedly unlawful method of procedure.

Before considering these arguments specifically a brief general discussion is required. The statutory requirement for the bringing of a suit for declaratory judgment is the existence of an "actual controversy" as to rights. Otherwise stated, there must be an uncertainty in the mind of one of the parties as to his legal status plus the possibility of damage to him if he acts on his own interpretation of it. A decision of the controversy by any tribunal changes the entire situation. An uncertainty may still exist in the mind of the losing party as to the correctness of the decision, but as pointed out in our original brief, this is not such an uncertainty as to confer jurisdiction under the Declaratory Judgments Act, as that statute was not designed as a means of testing the correctness of the decisions of another tribunal.

With this fundamental principle in mind, let us examine the plaintiff's four arguments above noted:

(1) The nature of National Railroad Adjustment Board—The plaintiff points out on pages 52 to 54 of its brief that the members of this Board are selected and paid by private interests, instead of being appointed by the government, and it concludes that this fact is of such significance as to "operate to render unconstitutional any attempt by Congress to vest the determinations of the National Railroad Adjustment Board with the degree of conclusiveness against attack in the courts which is enjoyed by determinations of such bodies as the Interstate Commerce Commission."

We submit that this argument completely misses the point. No contention has been made by the defendants that orders of the National Railroad Adjust-

ment Board are endowed with any "conclusiveness against attack" in proper proceedings for review. All administrative orders which are not purely ministerial in nature are subject to judicial review. The question involved in this case is not the *effect* to be attached to the orders of this Board in review proceedings, but rather the propriety of the *method* of review attempted.

If, as we have shown, the function of a declaratory judgment is not to pass upon the correctness of a decision of another tribunal, the nature of the tribunal making the decision is immaterial.

(2) The nature of the awards and orders of the National Railroad Adjustment Board—The Railway Labor Act provides that an award of the Board shall be "final and binding upon both parties to the dispute," *i.e.*, the employees and the carrier. We have pointed out already that this language of the statute is qualified in effect by the fact that the Board itself has no power of enforcement. This factor has been seized upon by the plaintiff as the basis of an argument to the effect that procedure looking toward a declaratory judgment is available as a means of review of such awards. By implication the plaintiff appears to concede that an administrative order, which is enforceable by the tribunal issuing it, cannot be thus reviewed. As we have seen, the basis for an action for Declaratory Judgment is found in a controversy giving rise to uncertainty as to the status of legal rights. When an administrative decision has been issued passing upon those rights, what difference is made because of its *administrative* enforceability or non-enforce-

ability? In either case an actual decision has been made. In either case the person against whom it was rendered has the option of compliance or non-compliance. In either case by non-compliance he subjects himself to an enforcement procedure, which, in the first case, takes the form of administrative coercion, and in the second takes the form of a suit seeking judicial coercion. In both situations any uncertainty as to *rights* is terminated through the administrative decision and compliance therewith ends the controversy. In both situations a measure of uncertainty may be perpetuated by refusal to comply with the decision, but that uncertainty results not from any doubt as to the rights themselves which might arise from the lack of an applicable decision (which lack may form a proper basis for an action for Declaratory Judgment), but from a doubt as to the correctness of the decision (which is not a proper basis for such an action).

Thus the distinction which the plaintiff seeks to draw between administrative decisions which are, and those which are not, enforceable by administrative orders, is a mere distinction without a difference, for in neither case do we find any basis for the prosecution of an action for Declaratory Judgment.

The third and fourth arguments of the plaintiff in this connection may be considered together. Both point out what are alleged to be errors of law committed by the Board in this case. It is asserted first that the decision was erroneous in that it sought to incorporate terms in the contract between the parties which are not contained therein (which, as we have seen, is merely the classical and stereotyped way of

saying the contract was misinterpreted), and, second, that the Board's procedure was erroneous. These claims, if correct, might well justify a court in setting aside an order of the Board which was properly before it on review, but are utterly irrelevant to the issue of the correctness of the procedure by which that review is sought.

We have no quarrel with the cases cited by the plaintiff in this section of its brief (pages 46 to 51) to the effect that a judicial review should be available to parties aggrieved by administrative order; or that where no method for such review is provided by statute, the general equitable jurisdiction of the courts may be invoked for that purpose. We repudiate, however, the statement attributed to us on page 51 of the brief to the effect that "defendants correctly assert that the statutory suit which employees are authorized to bring under Section 3(p) of the Railway Labor Act is not a review proceeding." We are at a loss to explain how the plaintiff could have so thoroughly misconceived our argument on this point inasmuch as the defendants have throughout contended exactly to the contrary.

It is apparent that the cases which the plaintiff cites have no bearing upon a situation where a specific method of review is provided in the statute which has established the administrative board in question.

Further, while it must be conceded that if no statutory method of review were provided, the courts might in an appropriate case exercise general jurisdiction to provide such a review, it by no means fol-

lows that they may do so through the medium of a Declaratory Judgment, which in no event can be considered as a procedure appropriate for the purposes of review.

Hence the conclusion reached in our principal brief in this regard is unshaken. The Declaratory Judgments Act was passed in order to provide a means for the determination of undecided issues—not as a means for determining the correctness of prior decisions of those issues; or, in other words, a judicial review may not be obtained through the medium of a Declaratory Judgment.

III. The Effect of the Granting of Such Judgment Upon the Rights of the Parties.

In this connection the defendants have already pointed out that the granting of the relief asked in this case will effectively deprive them of certain rights guaranteed by the Railway Labor Act as to the bringing and prosecution of a proceeding for enforcement or review of orders of the Board, *viz.*: (1) The right of selection of a forum; (2) The right to the benefit of the statutory period of limitations of two years; (3) The right of exemption from certain liability for costs; (4) The right to recover attorney fees, and (5) The right of having *prima facie* effect accorded the findings of fact made by the Board.

As to the first two of these rights the plaintiff asserts they are merely the rights ordinarily held by potential plaintiffs, and are always and necessarily

taken away by the invocation of Declaratory Judgment procedure. This is not correct for, as we have already shown, these rights are not identical to the somewhat similar rights enjoyed under ordinary rules of law, but are especially accorded to the employees by the Railway Labor Act in order to accomplish special purposes. (See defendants' principal brief, page 39 to 40).

As to the third and fourth of these arguments, the plaintiff admits that the granting of a Declaratory Judgment will deprive the employees of the rights in question, but says in effect that such a result may be justified by the employees' failure to bring suit, and thus secure the enjoyment of these rights. By this argument the plaintiff is clearly seeking to have this court amend the Railway Labor Act. This statute sets up the rights in question and provides that they may be exercised within two years of the effective date of an order of the Board. The court is being asked to decree that these rights are available only during the indefinite period of time between the granting of such an order and the date when the carrier elects to bring suit for a Declaratory Judgment. If this had been the purpose of Congress in enacting the Railway Labor Act why, may we ask, did it not so state?

In addition to causing a practical nullification of certain provisions of the Railway Labor Act, this doctrine, if adopted, will inevitably result in a race between carriers and employees to see which can get into court first if an order is issued—the prize being the various advantages which the employees will or will not receive depending upon the identity of the

plaintiff. Due to this necessity for haste in invoking the jurisdiction of the courts, if statutory rights are to be protected or defeated, many cases which could be amicably compromised will reach the courts for judicial determination, a result which is foreign to the essential purposes of the Railway Labor Act.

The fifth right of the employees above mentioned is not considered by the plaintiff in this section of its brief, but is obviously subject to the same considerations as above outlined.

As to the alleged rights of and possible damages to the plaintiff, little need be added to our original discussion. Plaintiff complains of certain injustices and asserts these injustices as the basis for seeking a Declaratory Judgment. When analyzed, the injustices in question are revealed as being neither more nor less than the unequal consequences intentionally attached to the orders of the Adjustment Board by the statute. If there is any real injustice here (which we do not admit) the plaintiff's remedy is legislative—not through an action designed to procure from the courts a judicial amendment of the statute.

SUMMARY

We are fully aware that technically the burden of the issue in this proceeding is upon the defendants. It must be borne in mind, however, that the plaintiff is asking of this court a form of relief which is unusual, and which, if granted, may have far-reaching consequences. Thus the nature of its plea places upon

the plaintiff the duty of affirmatively maintaining, by reason and authority, the propriety of the relief prayed for in regard to the situation in which it is sought. The plaintiff's memorandum, however, is singularly deficient in any such positive justification of its position both in what it has said and in what it has left unsaid. In closing this reply we wish to touch on a few of these deficiencies.

(1) *The lack of cited authority for plaitniff's position.* It is apparent from plaintiff's memorandum that it is seeking to extend the scope of the relatively new type of legal relief provided by the Declaratory Judgments Act into an untried field. Although the diligence of the plaintiff's counsel has produced a large number of decided cases for the consideration of the court, not one case is cited which specifically supports the proposition that the courts may by Declaratory Judgment provide a judicial review of administrative decisions. This dearth of authority in and of itself is indicative of the fact that the plaintiff is seeking to apply the Declaratory Judgments Act to a sort of situation to which it has never been applied and was never intended to be applied.

(2) *Lack of complete statement of position regarding awards of Adjustment Board.* Just what legal effect does the plaintiff attach to the awards of the Adjustment Board? It is clear that it considers itself privileged to ignore the award issued in this case and to sue on the contract without reference to the award. If the plaintiff may do this, any carrier similarly situated may do the same. It is obvious that the carrier

may only ignore the award if the award itself has no legal significance, *i. e.*, if it is a nullity. Why is this award a nullity? Has it always been such, or did it become so only on the filing of this suit for Declaratory Judgment? Can a private party nullify an administrative order merely by bringing a Declaratory Judgment action? If such awards are nullities as to the carriers, are they nevertheless to be considered as binding upon the employees, or are they nullities as to the employees also? All of these questions are inherent in the position which the plaintiff has taken, yet plaintiff has made no attempt to answer them. It has contented itself with asserting an individual right to a Declaratory Judgment—let the chips fall where they may. The above are some of the legal chips which will necessarily fly from a judgment for plaintiff in this action, and we believe that the court is entitled to know where they will fall and upon whom, before it renders a decision.

(3) *Lack of clear statement as to the effect of a Declaratory Judgment upon subsequent proceedings.* If the court grants a Declaratory Judgment in this case, what effect will it have upon an action which might be subsequently brought to enforce the award of the Board? It is provided in the Railway Labor Act that the petitioner before the Board "or any person for whose benefit" its order was made, has the right to file an enforcement proceeding. Is that right to be considered as taken away by the granting of a Declaratory Judgment? We presume from the tenor of its argument that the plaintiff would answer this question in the affirmative and would contend that a

Declaratory Judgment might be made the basis of a plea of *res adjudicata* in an enforcement action. It could have such an effect, however, only as to the parties and issues before the court in the Declaratory Judgment action. As to parties, the petitioner before the Board, *i. e.*, the labor organization which represents these employees, has a right to bring an enforcement action but is not named as a party to this suit. In view of plaintiff's insistence that the present suit is not one to review the order of the Board, we may well ask whether the question of the validity of the award is before this court at all. If not, then the Declaratory Judgment of this court will not decide the question of the award's validity in such manner as to be binding in an enforcement proceeding. Furthermore, it is to be remembered that a different rule is to prevail in an enforcement action regarding the burden of proof and the value of certain evidence inasmuch as the findings of fact of the Adjustment Board are to be held *prima facie* correct in such a proceeding.

If the Declaratory Judgment prayed for here would not be *res adjudicata* as to all of the persons or of all of the issues involved in an action to enforce the award, we have the possibility of there coming into existence two judgments—one the Declaratory Judgment of this court, and the other a judgment of enforcement of another federal court, the one holding that the plaintiff's contract with its employees has a certain meaning, the other enforcing an award of the Board which attaches to the same contract a different meaning. Under such circumstances, which judgment is to prevail?

It follows from all of the foregoing that the plaintiff is seeking to have this court apply the Declaratory Judgments Act in a field where its application is unprecedented. It is of vital importance to the court, as well as to the parties, to have some idea concerning the probable legal effects of such an application. This is particularly true here, where another statute is involved which has created a carefully planned procedure of administrative action and of judicial review. The plaintiff's memorandum sheds little light on the question of the reaction which a Declaratory Judgment might be expected to have upon the Railway Labor Act, the National Railroad Adjustment Board, the decisions of that Board, and the enforcement and review proceedings provided by the Act.

The defendants on the other hand have shown that the necessary effect of the issuance of such a judgment will be to provide an extra-statutory method of review for the Board's decision when the statute contemplates an entirely different method as the exclusive means of accomplishing such a result. Any judicial review, and in particular a review sought under such circumstances, is not contemplated by the Declaratory Judgments Act as a proper exercise of this new and extraordinary jurisdiction which has been conferred by it upon the courts.

Further, the defendants have shown that the necessary effect of granting the relief asked will be to shear the defendants and other employees of the nation's carriers of rights granted them by statute, to reduce the awards of the National Railroad Adjustment Board to the status of legal nonentities and to

nullify Section 3 of the Railway Labor Act and the wholesome congressional intent underlying that section. It follows that this court in the exercise of its sound discretion should hold that the complaint fails to state a cause of action for Declaratory Judgment.

Respectfully submitted,

FRANK L. MULHOLLAND,
CLARENCE M. MULHOLLAND,
WILLARD H. MCEWEN,
HAROLD C. HEISS,
RUSSELL B. DAY,
WILLIAM E. WILLIS,
Attorneys for Defendants.

261 Transcript of Argument

Filed June 10, 1939

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262 Court House Building,
Washington, D. C.,
Monday, May 15, 1939.

The above-entitled matter came on for oral argument, pursuant to notice, at 1:30 o'clock p. m.

Before O'Donoghue, J.

Appearances:

John Dickinson, Esq., 1740 Broad St. Station Building, Philadelphia, Pennsylvania.

Sidney R. Prince, Jr., Esq., Southern Ry. Building, Washington, D. C., and

Guy W. Knight, 1740 Broad St. Station Building, Philadelphia, Pennsylvania appearing for Plaintiff.

Willard H. McEwen, Esq., 1041 Nicholas Building, Toledo, Ohio.

Frank L. Mulholland, Esq., 1041 Nicholas Building, Toledo, Ohio, and

William E. Willis, Kellogg Building, Washington, D. C., Attorneys for Defendants.

263 *Preliminary Argument of Legal Issues Raised By the Answer*

Mr. Prince: If Your Honor please, I would like to introduce Mr. John Dickinson, appearing for the plaintiff; he is a member of the Pennsylvania bar and a member of the bar of the Supreme Court of the United States.

Mr. Willis: I desire to introduce Mr. Frank L. Mulholland and Mr. Willard H. McEwen of the Toledo bar; they are also members of the bar of the Supreme Court of the State of Ohio. They, with myself, represent the defendants.

Mr. Dickinson: If the Court please, we are here on what really amounts to a motion to dismiss made by the defendants. We represent the plaintiffs; we filed our complaint, and thereupon they filed an answer which included certain legal defenses going to the whole cause of action, and we have moved that those legal defenses, as we are entitled to do under the new rules—as I understand them—they should be urged separately in order to avoid necessity of having to prepare for a long trial, if there is no cause of action and, consequently, since the defendants are really in the nature of the moving parties here today, we have talked the matter over and reached a conclusion that it is for them to open and close.

264 The Court if this motion to dismiss should be overruled, will this case have to be heard on the merits, or are the facts in dispute?

Mr. Dickinson: Yes, if the motion to dismiss is overruled, then the case will have to be tried on its merits; if, on the other hand, the motion to dismiss is sustained we feel there should be no necessity for putting both parties to the trouble of preparing for what will be a rather long and intricate trial.

The Court: Is there so much dispute about the facts?

Mr. Dickinson: There is a great deal of dispute about the facts; the fundamental cause of action is as to the interpretation of a contract but, in order to interpret that contract, the situation at the time the contract was entered into, and the practical application of the contract over a period of almost thirty years, is involved, and we feel that in order to support a proper interpretation of the contract those facts will have to be gone into.

The Court: The only question in my mind was whether or not it would be possible to dispose of this case at the final hearing and not take too much time on it now.

Mr. Dickinson: Of course, the point there is whether or not it would be fair to the parties to require us to
265 prepare for trial in the event that at the time of the trial it should turn out that there was no cause of action.

The Court: Both sides consider that it would be impractical to try it on the merits now?

Mr. Dickinson: It certainly could not be tried on its merits now or next week; we would have to start the preparation for the trial; some of the witnesses are people whose recollection goes back twenty or thirty years and are no longer around Washington.

The Court: Very well; if counsel feel that it is not practicable for those things to be heard on the merits and disposed of once and for all, considering the time of the parties and the Court—you do not think so, do you?

Mr. Dickinson: We think very definitely that it could not be brought on for trial at the present time.

Mr. McEwen: We agree to that, Your Honor.

The Court: All right, it will come on for hearing on motion to dismiss the bill on account of the legal defenses raised in the answer.

Mr. McEwen: That is the situation. Before proceeding with the argument, in the first place, the argument will involve some points on the construction of the Railway Labor Act, and maybe some other Federal Statute.

For the Court's convenience, I have here a pamph-
266 let copy of that statute—the Railway Labor Act—if you care to consider it in the course of the hearing.

Furthermore, in order to save possible repetition—I am aware that Your Honor's time is taken up pretty much today, and I was wondering whether or not Your Honor would have an opportunity to give consideration to the pleadings at all.

The Court: I have not given them any consideration; I don't know a thing about them except from just glancing over a long bill, and I see where the defenses are set forth, and the different parts of the defense—you attack all of the paragraphs of the bill on the merits?

Mr. McEwen: Yes, sir.

The Court: You have a motion to dismiss the bill because there is no cause of action?

Mr. McEwen: That is approximately correct; yes, sir. We have stated our different defenses. You see, this is an action brought by the Washington Terminal Company against a group of its employees; the prayer of the case is for a declaratory judgment. Our first defense is that the allegations of the complaint are not sufficient to state a cause of action and, on that point, we ask that the complaint be dismissed.

The Court: Very well.

267 *Argument of Mr. Willard H. McEwen on Behalf of Defendants*

Mr. McEwen: If your Honor please, the only issue that is involved in this proceeding is the appropriateness of the remedy sought by the plaintiff; in view of the facts of this case, that is the only issue that is before the court.

Accordingly, it will not be necessary to go to any great extent into the facts except merely to show your Honor the stage setting in which the case operates.

The action, as I have said, is between the Washington Terminal Company and a group of its employees who work, have worked and are now working in its service as locomotive firemen and engineers.

The Washington Terminal Company is the owner and operator of the Washington Union Passenger Station; it owns no main line track, although it is a common carrier by railroad. It operates no trains, but it does own yard trackage and it does own and operate locomotives, which are used purely for switching over that yard trackage.

It has been the practice of this carrier for some time to use leased facilities—facilities are leased to the main line roads, which are spoken of in the complaint as the
268 "tenant lines," and its operations are conducted somewhat in this manner:

The main line trains come into the station with road engines and crews supplied by the railroads on which those trains originate; that is purely line of road movement.

On bringing those trains to a halt, however, it has always been the custom of this carrier to require, by agreement

with the tenant lines—to require those road engines and crews to do a certain amount of movement of cars in and about the yard.

Now, there is an agreement—a collective agreement—a union contract between the Washington Terminal Company and those employees, negotiated for the employees by the Brotherhood of Locomotive Firemen and Enginemen; they are represented by the three unions.

This agreement provides, in brief, that the employees shall be granted seniority rights in the work performed by the Washington Terminal Company; that provision and this custom of the Company to use a road engine and crews in the moving of certain cars has given rise to controversies of long standing.

It is the contention of the employees that the provision of the contract governing seniority rights cover a certain amount of work performed by the Washington
269 Terminal Company.

Mr. Dickinson: May I interrupt for just a moment? There is nothing in the contract about seniority rights with respect to certain work; it just says "seniority rights."

Mr. McEwen: I am now merely stating the contentions of the employees. The merits of that contention, Your Honor, are not before the Court and are not presented to the Court in this proceeding—just so that Your Honor may appreciate the controversy that is going on, and the solution of that controversy, which solution is now before the Court.

The carrier, of course, has contended that it is entirely within its rights under the contract to cause those movements to be made by the tenant road engines and the crews.

This controversy, as I say, has been a matter of long standing; efforts have been made to adjust it between the parties directly, without any success and, finally, it was submitted to the Railroad Adjustment Board, a Bureau organized pursuant to the Railway Labor Act, holding its sessions in Chicago; this Board holding a hearing, and the parties appeared before it, and the Board took the case under advisement and the Board decided the controversy in favor of the contention of the employees. It issued its award embodying that decision, a copy of the award

270 being attached to the complaint, and an order to the carrier directed it to comply with the award.

The carrier did not comply with the award, however, with the result that various individual employees who had seen various services performed by the road crews, which service they considered they were entitled to perform, have from time to time presented to the carrier claims for compensation for this work which they allege they should have been allowed to perform.

The carrier now brings this action in this Court for a declaratory judgment, and I might say to Your Honor, to start with, in the discussion, I believe this to be an entirely new and novel sort of relief to be asking for under the Declaratory Judgments Act.

There is no precedent for the use of the Act as a review procedure, and there is certainly no precedent as to the use of the Act in testing the sufficiency of the award of the National Railroad Adjustment Board.

I want to discuss this part of the Act a little more at length at a further stage in the discussion.

The Railway Labor Act is a statute designed to permit collective bargaining, and it is the contention of the defendants in this case that the relief which the plaintiff is seeking is inappropriate, in the first place, because there
271 is a specific remedy provided by the Railway Labor Act whereby the awards of the Adjustment Board may be brought before the Courts—a remedy which is especially adapted for that purpose.

Mr. Dickinson: But available only to the employees.

Mr. McEwen: Available only to the employees; that is to say, the employees may bring the action, and the carrier may defend it.

It is our contention that that remedy is designed by the Act to be an exclusive remedy and therefore, under the Declaratory Judgments Act and well recognized principles of law, that remedy cannot be set aside; the remedy by Declaratory judgment may not be substituted for it and that therefore the proceeding under the Declaratory Judgments Act is appropriate.

In the second place, it is our contention that the Declaratory Judgments Act in no event, regardless of the provisions of the Railway Labor Act—that in no event does it

provide or intend to provide a proceeding for the review of the decisions of other tribunals, whatever may be their nature.

Now, we will consider first these two contentions: that there is a special procedure—an exclusive procedure—provided by the Railway Labor Act whereby those mat-
272 ters may be brought to the Court.

In order to show the exclusive nature of that procedure, it will be necessary, I think, to discuss to the Court, to some extent, at least, the purposes of the Railway Labor Act. The machinery which is set up in the Act and, specifically, directing the Court's attention to the language of the statute which we believe, taken in conjunction with its general purposes, provides an exclusive avenue of approach to the Courts.

Mr. Dickinson: Mr. McEwen, if I may interrupt for a moment.

Mr. McEwen: Yes.

Mr. Dickinson: Are you taking the position that since enactment of the Railway Labor Act, controversies as to these contracts must be taken to the Railway Adjustment Board?

Mr. McEwen: That is right.

Mr. Dickinson: And go up through the Adjustment Board, and the jurisdiction of the Courts is ousted?

Mr. McEwen: Now, Mr. Dickinson, may I suggest that my time for argument to the Court is a little limited.

Mr. Dickinson: I am just asking you that.

Mr. McEwen: I think that might be brought out later in the argument.

Mr. Dickinson: You don't care to commit yourself?

273 Mr. McEwen: Not at the present moment; I will commit myself, sufficiently, I believe, before I get through.

Now, if the Court pleases, the purposes of the Railway Labor Act are to promote and to foster collective bargaining between employers and employees, and to provide administrative machinery whereby that collective bargaining may be made effective.

I suppose that all of us have had the term "collective bargaining" on our tongues considerably for the past few

years, but I doubt if most of the people who have used the phrase appreciate fully its entire significance. We naturally visualize a group of employees' representatives meeting with the representatives of the employer for the purpose of negotiating a collective agreement or union contract. That process of negotiation of agreements is, of course, an important element in collective bargaining, but it is only the beginning of the process and not the end of it because once an agreement has been made, I think Your Honor's own experience on the bench and professional experience, and certainly the professional experience of all of us causes us to realize that any contract made between any private parties, unless it be very simple, is likely to give rise to questions of its interpretation and application. This is particularly true of collective agreements designed to be enforced for many years; designed to cover
274 many situations and to provide for the situations of many different people.

If the interpretation and application of the agreement are matters to be left entirely within the jurisdiction of either employer or employee, it is obvious that collective bargaining is a farce because either side can easily interpret and apply the agreement which has been negotiated—can easily interpret and apply the agreement out of existence.

So that, as an essential feature of the collective bargaining process, it is necessary that means be provided whereby that process can be extended to the interpretation and the application of those agreements once they have been made.

The Railway Labor Act directs itself to both of those problems. Certain of its provisions are directed to the question of collective bargaining as a means of the execution of the contract; those are not for the Court to decide; certain others are directed to the means devised by Congress to protect collective bargaining; as to the interpretation and application of those agreements and those provisions, they are before the Court.

It is provided, in the first place, that the parties shall, if possible, hold conferences and adjust their grievances or their difficulties in those conferences. If they can-
275 not so adjust them, what then? Provision is then made in the Act for the creation of this Board—the

National Railroad Adjustment Board; it is a bi-partisan Board; half of its members are selected by the carriers and half by the carriers generally over the nation, and a selection in which the Washington Terminal Company participated when this Board was formed, and half by the National Labor Organizations of the employees.

It is divided into four divisions, each one having jurisdiction, however, only over disputes involving certain types of employment.

We are concerned here only with the first division which has jurisdiction over this type of case.

In the course of our brief, we have devoted several pages to the history of the development of Adjustment Boards—a history which is too long to repeat here and which is before Your Honor in printed form.

The Adjustment Board may be said to be—just to summarize—a Board hallowed by experience in a sense; it is a device which has been used nationally for over twenty years in the adjustment of this type of dispute and is a device which has been used on individual systems for longer than that.

It is a device which has been used very successfully because it has settled many thousands of disputes in various forms between employers and employees on railroads so, when the Railway Labor Act was amended on June 21, 1934, the framers of that Act adopted the adjustment Board device that made it a national institution, with jurisdiction nationally over all carriers and all employers to decide such cases as were submitted to it.

276

Just by way of completing the picture, it is provided that if this bi-partisan Board cannot agree in a given case, it may call in a neutral referee which sits with the Board and break the deadlock and render a decision.

Then, suppose the Adjustment Board has made its award; suppose it has decided that the employees are correct in their contention, then it makes an order directed to the carrier, ordering it to comply with the award under the provisions of the Act.

Now, I think we may say that we are getting really to the crux of the situation that is before the Court. Here your Honor will find a pamphlet which was passed up to you on page 8, section 3 (m) of the Railway Labor Act, at

the top of that page—the paragraph I marked in pen and ink, reading as follows:

"The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the
277 awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

What does this mean? It is rather apparent by examination of section 3 (p), which is the other section which has been marked on that same page, that it was not the intention of the framers of the Act to give an absolute finality to the decisions and awards and judgments of the Board; it was their intention to give what we have termed in our brief, the administrative finality, which is not a particularly clear expression perhaps, but I think we can clarify it by examining section 3 (p), which reads a follows:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition set-
278 ting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered,

under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Now, it is apparent, as Mr. Dickinson has already called to Your Honor's attention—it is apparent that the right of action that is granted under section 3 (p) is limited to employees who have prevailed in their cases before the Adjustment Board.

It is apparent, we readily concede, that the right
279 of action granted is in a sense one-sided; that only one party may appear in Court as plaintiff; that if a carrier is to appear in Court it must do so as defendant in such suit.

Now, why such provision for review? Because as your Honor knows, the Court is empowered not only to enforce the order but to set the award aside if it finds it legally insufficient.

Why those provisions? I think the answer is clear if we examine into the general basis of the Railway Labor Act. If the employees lose before the Court, their case is finally determined; they have no right to appeal if they lose; they have no right to review granted them by the statute, nor can they attack the statute as giving them inadequate procedure because I presume I am safe in saying that 99.9 per cent of those cases are presented by the employees and, having adopted the statutory procedure; having taken advantage of the statute, they are bound by its terms.

I might say in passing that those provisions of the Railway Labor Act are adopted almost verbatim from the provisions of the Interstate Commerce Act and the Packers and Stockyards Act providing for the review of reparations order of the Interstate Commerce Commission and of the Secretary of Agriculture; and, presumably, are designed to have the same legal effects, and under the Interstate Commerce Act it has been held that if a shipper proceeds before the Commission and loses, he has no right of
280 appeal.

Accordingly, I assume that if an employee proceeds before the Adjustment Board and loses, he simply has no right to carry his case into Court; his "day in court"

is ended. Now, the employee, therefore, goes before the Court at a certain disadvantage; if he loses the decree against him is final. If he wins, however, it is purely an interlocutory decree—an interlocutory decision, to gain the benefits of which he must file a suit in a Federal Court seeking enforcement of the Board's award.

In this suit he is given certain advantages; there is no question about that; he is given two years in which to file the suit; he is given the choice of courts in which to file it; he is given opportunity to recover his attorney's fees; he is given an opportunity to go in without liability for costs—all provisions designed to equalize the geographical and economic inequalities which normally exist between the carrier, with its wide spread lines and its large resources, and the individual employee or groups of employees which may be seeking to enforce an award of the Adjustment Board, and I think we can say, very frankly, that we believe those provisions were placed in the statute for just one purpose—they were placed there to make resort to the courts unproductive to the great carriers; they were placed there
281 to minimize the number of review proceedings which may be brought; they were placed there to give a certain sanction and compulsory force to the awards of the Adjustment Board; that is obviously the purpose and intent of this statute, when it comes to the Court and asks for a declaratory judgment, not by virtue of this statute, but by virtue of the Declaratory Judgments Act.

The plaintiff has set up a very appealing case in its complaint, but before considering that complaint in its detail it is desirable and necessary that the Court should realize the effect that the granting of a declaratory judgment will necessarily have upon the statutory procedure and upon the rights that are guaranteed to the employees by that statute, for if a carrier may come into Court for a declaratory judgment, the provisions of that statute, in section 3 (p) which I just read, are not applicable to the case, and the award of the Board and its findings of fact have no prima facie effect in this Court—

Mr. Dickinson: (Interposing) May I call your attention—

Mr. McEwen: Please refrain from interrupting, Mr. Dickinson; I will give you the same consideration when you are making your argument.

282 Mr. Dickinson: You will remember that?

Mr. McEwen: I will do that. Employees have no right in this Court to exemption of costs; they have no right to recover their attorney's fees, and the other rights guaranteed to them—all of those rights guaranteed to them by the statute for the specific and definite purpose of making the awards of this Board final; giving them as much administrative finality as it is possible for a statute to give, they will be completely eliminated in a declaratory judgment if it is issued in this action.

The plaintiff has taken a rather novel position. I think it will be apparent from our discussion that the Railway Labor Act provides a procedure with two steps: first, the administrative step before the Adjustment Board and, second, the judicial step whereby the awards of the Board can be brought into court.

It is the contention of the defendant that that judicial step—the second step—is an exclusive method of procedure.

Now, to proceed to answer Mr. Dickinson's original question as to the first step: it has been contended by the complainant in its brief that the first step is not exclusive;

283 in other words, that the party litigant before the controversy is in existence and before any action has been taken, that he has before him two roads which he may follow.

I am giving now, I believe, what is the plaintiff's contention: the first, the road—the road that we have discussed through the Adjustment Board, for the adjustment of the controversy regarding the interpretation of the contract; the second, the direct approach to the Courts seeking the judgment of the Courts interpreting that contract.

Now, the plaintiff has contended throughout that it is an option; that any party has an option as it comes to the forks in the road, to take either road.

That is not the position which we propose to argue in this case and it is not a position which we propose to deny; it is a position and a question which is not here involved. Our contention is that having taken the one road; having taken the administrative path, and having pursued it to the extent of getting an award of the Adjustment Board —a decision of the controversy—that whoever initiated the

proceeding, that has been the result, and that thereafte
neither party may ignore the whole administrative proc
dure—wipe it out; go back again to the fork in the road a
start all over again, and go down the other path.

That is our position—what might have been th
284 rights of this carrier had the award so issued, is n
a matter that is important in this case; that que
tion may well await the litigation that raises the issue.

The issue here is the avenue provided by the statute f
bringing these awards into Court. It is our contentio
that it is an exclusive right and that the Declaratory Jud
ments Act cannot be utilized as a substitute procedure.

Now, one further thought in that connection: what wi
be the effect of the granting of a declaratory judgment i
this case, on the procedure set up in the Railway Labo
Act?

The plaintiff contends that it has a right to a declar
tory judgment here because such claims are being file
against it by its employees and because it has doubts as
its legal rights; doubts as to the proper interpretation
the contracts and doubts which it wishes this Court to s
at rest.

I think it will be apparent that any carrier against who
an award of the Adjustment Board has been made is i
exactly the same position as the plaintiff; the facts upo
which the plaintiff depends for its cause of action are n
peculiar to its situation; they are the same facts—esse
tially the same facts—which are presented to every case
this type; in other words, if declaratory judgment
285 granted in this case there exists no valid reason wh
it should not be granted in every case where th
award of the Board goes against the carrier who is a part
to the proceedings.

Now, if that be the fact, the granting of a declarato
judgment and the sanctioning of that practice in cases
this kind can have but one effect; it wipes out entirely
of the rights that are guaranteed to the employees und
section 3 (p) of the Railway Labor Act; they are gone.

Mr. Dickinson: What rights are those?

Mr. McEwen: Those rights which I referred to a fe
moments ago—referred to the Court. The Act itself w

necessarily be crippled. The statutory procedure cannot help but be crippled.

As I called to Your Honor's attention, the employees now go into the Adjustment Board under certain disadvantages; if they lose the decision is final; if they win it is only interlocutory.

If the relief prayed for by the plaintiff is granted in this situation it will change that picture to the point where, if the employees lose it is final and if they win, the order of the Adjustment Board is worthless—is a nullity—and the carrier can easily at any time take the matter into
286 Court for a declaratory judgment and try the whole matter over again without reference to the award of the Board and without reference to statutory rights given to the employees after such an award has been issued, when it is brought into Court for review and enforcement.

Now, I feel that the declaratory judgment statute is new; of course, the procedure under it is novel; it is unusual in the Federal Courts; as a statute it is still young—only five years old—the courts are still working about in an effort to apply that statute in the sort of case it was intended to reach. There is no precedent for its use in a situation of this kind; there is no precedent for its use as a method of review of a decision of the Adjustment Board and, accordingly, I feel that the Court should be extremely cautious in this case and to be sure of the legal consequences of the decree which it is being asked to render.

Now, as I stated in the beginning of the argument, there is yet a second ground: we consider this action to be ill-brought; the Declaratory Judgment Act passed for the purpose of remedying a specific ill and a specific lack which existed in our judicial system. Where a man was engaged in business relations, contractural or otherwise of a legal nature, connected and associated, and was in doubt
287 as to his rights under that relationship, under our old procedure he had but one thing to do: he could act on his own interpretation of his rights at the risk of violating his prospective opponents' rights by bringing himself into Court; that was considered to be a wasteful process, so it was provided that where a party was in honest doubt as to the existence of rights, and where that honest doubt was such that he was liable for damage if he

acted upon his own interpretation or, rather, incurred this risk, he might first proceed in Court for a declaratory judgment.

As was stated by the Court of Appeals of the State of Kentucky in this connection in the case of Back's Guardian vs. Bardo, 234 Kentucky 211, cited at page 46 of our printed brief:

"The purpose of the Declaratory Judgments Act was to have a declaration of rights not heretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated. In other words, it was never intended as a substitute for a new trial, or other steps that the Code requires to be taken in the same action, or for an appeal to this Court. In the circumstances, the Court below should have dismissed the proceeding and not have proceeded to adjudicate the rights of the parties."

In other words, what plaintiff is seeking to do in
288 this case is not to get a decision of an undecided controversy, but to seek the judgment of this Court as to whether or not a decision which has already been rendered—an administrative decision—has been proper.

The uncertainty as to the rights which is in the mind of the plaintiff, is not an uncertainty that grows out of a lack of decision, but unwillingness to accept the decision which has been made, which is, in itself, a perpetuation of the uncertainty. This uncertainty is self created and it grows, not out of a doubt as to its legal rights, but out of doubts as to the correctness of the decision of another tribunal, and that, if your Honor please, is not the purpose of the Declaratory Judgments Act; it is not an appeal statute; it is not a method for review; it is a method for deciding rights which have not theretofore been decided.

Now, in this same connection there is another matter: the order of the Board itself does not threaten the plaintiff with any damage. The order of the Board, as far as the Board is concerned, is an enforceable order; it is enforceable only by Court action and, certainly, before the plaintiff can show that it comes properly within the purview of the Declaratory Judgments Act, it must show two
289 things, as we have noticed: that it acts upon its own interpretation that damage will result.

Now, as far as the award of the Board is concerned, no

interpretation which the Court might place upon that order will affect the plaintiff's rights a particle; the plaintiff is subject to no damage from any enforcement of the award except in judicial proceedings which afford its "day in court", and where it may test out the correctness of the award itself.

Now, in closing this phase of the argument, I just want briefly to call to your Honor's attention the fact, as I have already said, that I feel your Honor is being asked to disrupt the administrative processes of the Railway Labor Act; is being asked to invalidate section 3 (p) and the other provisions of section 3.

The Court is being asked virtually, by statutory amendment, to take that portion out of the statute because the granting of a declaratory judgment would render all of section 3 in the Adjustment Board's procedure nonsense.

The Board itself would be reduced to the position of an academic debating society whose words had no significance whatever, and the Act itself reduced to the status of a mere exercise of Congressional interest.

290 The system which Your Honor is being asked to interfere with is a successful system.

I wish in closing to quote some statistics already in the briefs. This Board since its establishment, for the period ending June 30, 1938, which is the last period for which we have reliable statistics—the last report the Board made—docketed a total of 7,109 cases; 3,891 cases have been heard and 4,247 cases decided. Of this total the first division alone has docketed 6,080 cases, has heard 3,078 cases, and has decided 3,329.

If that is true, if this declaratory judgment should be granted in this action, and if this administrative machinery is to be thus wrecked, the purposes of the Railway Labor Act providing for the orderly settlement of disputes, will be nullified to the extent of those many thousands of cases; the fact remains that the provisions of the Act including those for review enforcement and review of the awards of the Board, however they might seem to the Court—just or unjust, to be fair or unfair, equal or unequal, they are the judgment of Congress, and that judgment has been substantiated by the fact that the Act is and has been a success.

291 ***Argument of Mr. John Dickinson***
on Behalf of Plaintiff

Mr. Dickinson: If the Court please, I foresee that my argument will probably take about an hour and a half—our full time, and I will either proceed at the present time for forty five minutes, and then, or whenever your Honor chooses to adjourn Court; or else, if your Honor desires, to adjourn Court at an earlier time, I will be very glad to postpone whatever argument I might have until tomorrow morning—what is your Honor's pleasure?

The Court: I don't mind sitting late; you can go ahead and maybe you will finish by the time I want to adjourn.

Mr. Dickinson: I am afraid I won't.

The Court: Go ahead anyway; there is plenty of time tomorrow.

Mr. Dickinson: Thank you. If the Court please, I would like to bring the discussion down to particulars: I think it was Mr. Justice McKenna who, in one of his opinions, said that alarms are not arguments, and we have no intention here of wrecking anything or of reducing anything to invalidity, as I think I shall show, but I will say before my argument has reached its conclusion, it might very well appear that the position which the defendants are taking in this case is a position which will reduce the con-

292 tracts that are arrived at by collective bargaining, to something that is, in no legal sense, contracts at all, and we feel that it is to their interest, as well as our interest, that any such results as that should not be reached, but that those contracts arrived at by collective bargaining should be given the same measure of legal protection—and that means the same measure of legal protection to both sides—as is given to other contracts in the law, or else collective bargaining is a delusion and a sham.

But, leaving those generalities for the latter part of the argument, and coming down to particulars, this case is a case involving the construction of a contract. In 1923 a contract was made by the Washington Terminal Company with the Labor Organizations which represented its yard engineers and firemen and which included among its provisions a term respecting "seniority"; that is substantially the same term that had been used previously in the employment contracts of the company dating back to 1910.

A dispute has arisen between the company and its employees respecting what that term "seniority" means, and the employees are threatening the company at the present time with demands for money payments based upon their interpretation of what the word "seniority" means.

293 So that unless there is some special obstacle here, the case seems to be a perfectly normal one for the application of the declaratory judgment procedure.

Mr. McEwen spoke of that procedure as limited to cases where people are in business together and fell out about the meaning of the contract which embodied their mutual arrangements.

Well, I take it he did not mean to limit the operation of the Act in partnership cases.

The Washington Terminal Company and its employees are in a sense in business together; that is, the successful conduct of their business depends upon their being able to reach an understanding with regard to their mutual relationships and they have reached an understanding resulting in these claims and demands which we now come into Court and ask to have the Court adjudicate in the same way as they would adjudicate the interpretation of any other contract.

So, I say the case seems to be clearly one for a declaratory judgment unless there is some special obstacle, and the obstacle which is suggested in the argument arises out of the Railway Labor Act of 1934.

As Mr. McEwen stated, the defendants are apparently unwilling to take a specific position as to the nature of the obstacle, as to whether the mere existence of the

294 Railway Labor Act and the Adjustment Board bars access to the Courts so that all controversies respecting these employment contracts must go via the Adjustment Board's procedure, or whether the obstacle consists of the fact that in this case there have been proceedings before the Adjustment Board. I understood him to say that he does not take the position as between those two obstacles.

Now, as to the first point, namely, that the mere existence of the Railway Labor Act and the existence of the Adjustment Board thereunder establishes an exclusive procedure for the interpretation and construction of labor contracts,

that seems to be conclusively answered by a whole line of cases cited at pages 8 and 9 of our brief, where the construction of labor contracts between a railroad and its employees has been submitted to the Courts without going through the Adjustment Board procedure during the last three or four years when that procedure has been available.

So, I take it that for the purpose of this case we might really concede the defendants objection as being based upon the fact that here, as they say, the controversy has actually gone to the Adjustment Board.

Now, before dealing with the merits of that argu-
295 ment, I would like briefly to put before the Court, first, the picture of what this controversy is about and, second, a picture of this Adjustment Board and its procedure.

There has been a great deal of talk here and in the defendant's brief about the Adjustment Board as if it were a body of the same character of the Interstate Commerce Commission, or the other great Commissions which have been set up on the model of the Interstate Commerce Commission, and we really cannot progress very far in the argument until we first see what this Adjustment Board is; how it is made up; how it proceeds, and how it arrives at its awards and orders, but first of all as to what the controversy is about:

While, of course, the substantive issues of the case, are not before the Court for decision on this motion, it may be of some assistance to state what the controversy is about in order that it may be clear what the Adjustment Board has done.

The Washington Union Passenger Station was opened for use in 1908 and, from the early beginning of the time when that station was opened for use, it has been the practice that when a passenger train comes in over the Baltimore & Ohio or the Pennsylvania or the Southern and empties its passengers on the station platform, the road engine that brought that train in over the Southern
296 railway or the Baltimore & Ohio railway or the Pennsylvania railway, as the case may be, then proceeds to haul the empty cars out into the yard as it moves on its way towards the roundhouse, and it drops the empty

cars off in the place provided for the storage of such cars, and continues on towards the roundhouse, instead of having an extra switching engine move up behind the cars, couple on to them and pull them back to the yard while the road engine moves back without any cars, thus requiring two engine movements where one will do the work.

That has always been the practice and, in the same way, when the train is about to go out over the road, the engine of the Pennsylvania Railroad or the Southern Railway or the Baltimore & Ohio Railroad, leaving the roundhouse to back into the station, will back on to the empty cars on its way, and will back them into the station to receive passengers and be prepared to leave, that, as I say, has been the uniform practice for thirty two years, and while that practice was in effect in 1910, there was introduced for the first time into the contracts between the Terminal Company and its employees a provision guaranteeing the employees "seniority rights,"—so-called "seniority rights."

The provisions of that contract as set forth in the bill of complaint on page 14, exhibit A, and in the following year, 1912, there was another contract made with the engineers—the yard engineers employed by the Terminal Company, giving to them seniority rights, and those provisions for seniority rights were elaborated and extended in an agreement made during the period of Federal control between the Railroad Administration—Director General of Railroads—and the employees of the Washington Terminal Company and, finally, they were carried over into the contract of 1923, which is the contract now in force.

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During all of those years when "seniority rights" first were written into the contract, and when the contracts were reviewed and revised, the practice continued of having those movements of the empty cars back to the yard and of pushing the trains that were about to leave into the station to receive passengers, having those movements made by the road engine and, apparently, nothing was said about it, but in comparatively recent years, a theory has been advanced by the Labor Organizations representing the employees of the Terminal, which gives a somewhat novel interpretation to the notion and the word "seniority," and I would like to call the Court's attention to that contention.

It is said that the right of seniority does not mean the right of one employee who is older in point of service to do work ahead of another employee who is junior in point of service, but that it means a great deal more than that; that it means that a whole group of employees as between whom seniority rights exist, must be construed as a group to have the exclusive ownership or right to perform a certain kind of work to the exclusion of anybody else, and the argument is that because the Washington Terminal Company recognizes seniority rights as between its yard employees, that means that its contract with those employees must be construed to give to those employees an exclusive right to perform the total volume of whatever kind of work can be conclusive on some abstract basis as yard basis, and so it is said that since the Washington Terminal Company has recognized seniority as between people who man these yard engines, that that means that it has contracted with them to give them the work of moving the cars back and forward—the empty passenger cars back and forward, which is now and always has been performed by the road engine.

In other words, as I understand their position, by making a contract with people who operate yard engines, that it will recognize seniority among those people. It is said that we will exclude the performance of any work from any other class of employees and that that means that it has by contract given up its right to permit the movements of those empty trains into and from the station to be made by the road engine.

Now, the practical consequence of accepting any such construction as that is perfectly obvious; from a railroading standpoint it would be the duplication of engine movements; that instead of being free to permit one engine—the engine that has brought the train in over the road—to move the cars back to the yard; the Terminal Company would have to bring in a yard engine and hook it on to the rear of the cars, and have two engines make the movement instead of one, which we allege is not only merely uneconomical to the last degree, but also at periods of peak travel and rush hours, would absolutely clog and encumber the expeditious operation of the terminal; nevertheless, that is the claim which was made a number of years ago by the

yard employees of the Washington Terminal Company, and that is the claim which, when it was rejected by the Terminal Company as going far beyond the possibility of any rational interpretation of the contract, was taken by the defendants here to the so-called Adjustment Board.

Now, let me call the Court's attention to the Adjustment Board.

The Court: Before you take that up, what engines do the employees of the plant operate in the yard?

300 Mr. Dickinson: They operate those switch engines or yard engines which move cars in and about the yard in the course of switching operations.

Mr. Prince: They make up trains.

Mr. Dickinson: They do some of this type of thing; if a train is to be made up from a number of different tracks; if baggage cars or mail cars or express cars have to be moved from the station to the express platform; if sleeping cars have to be pulled off of the rear of one train and put onto the rear of another train—work which they have always done from the beginning, but there never has been any recognition of any exclusive right on their part to do work of that character, and we submit that a contract has to be interpreted in the light of the practices that exist when the contract was made, and that it is also to be interpreted in the light of what was done under the contract after it was made.

Sir Edward Sugden, when he was Chancellor in Ireland, was the author of the aphorism that is basic in the law of contract: "Tell me what men have done under the contract, and I will tell you what the contract means."

This practice has gone on under this contract for thirty years and, by far the larger portion of that time there has been no question at all as to those men being entitled to any exclusive rights to do all of the work of that

301 kind, but I submit that in any event, to make such a claim on the basis of the mere word "seniority" is to spin the implicitness of the word into a filigree so fine that there is no possible basis for it.

Now, if the Court pleases, the Railway Labor Act was enacted by Congress on June 21, 1934 and, among its other provisions, it provides for two different Boards—two entirely different agencies—which have in common merely

the fact that they are both named Boards and which, perhaps, need to be distinguished.

First of all, it provides for a body known as the National Mediation Board which, I believe, has occasionally been in this Court—a governmental body composed of appointees of the President, and paid out of the Treasury, and prohibited by the statute from having any interest in the railroad industry either as employers or employees.

Now, the National Mediation Board is authorized, whenever any employee or group of employees are dissatisfied with their contracts, to intervene in the case to bring about, if possible, by agreement between the parties, some change or modification of the contract and, if that cannot be done, then the Act contains a further provision that it is not necessary to go into Court; in other words, the Act clearly contemplates and provides for a case where there
302 is a fault by one party or the other of the contract to a need for a change in the contract by an alteration of its provisions or by the inclusion of new provisions, and that the body which is concerned with such changes as the Mediation Board.

Now, the Act also sets up another Board—the so-called Adjustment Board which is here involved and as to the nature and procedure of which I wish to call your Honor's attention.

It is not like the Interstate Commerce Commission; it is not like the Federal Trade Commission; it is not a governmental body consisting of government employees at all.

The Act provides that taken as a whole and including its four different divisions which shall consist of thirty six members, eighteen of whom are appointed by the carriers and eighteen by the organizations.

The Act goes on to provide that each member of the Adjustment Board shall be compensated by the party or parties he is to represent.

It is thus a body of private and privately paid representatives of the parties to the dispute.

There is no term of office specified for the members, and the inference follows that from time to time any member of the Board may be dismissed or removed if there is action that does not meet with the approval of the group whom he represents.

303 The National Adjustment Board has functions which are described in section 3 (i) of the Act; it is there provided that if there is a dispute between a carrier and one of its employees or group of employees, growing out of a grievance or out of an interpretation of a contract concerning working conditions, then either party, without the assent or cooperation of the other, can take the dispute before this Board and this Board is authorized to make an order or award.

Now, if the court please, that is what happened in the present case; the representatives of the labor organizations called upon the Washington Terminal Company to change its practice so that all movements in or about the station should be performed by the yard engines of the Terminal Company, and that those movements by the road engines should not be continued.

The Terminal Company informed the employees or the labor organizations representing them that the demand was one which was not based on the contract but which went far beyond anything in the contract and, thereupon, the representatives of the labor organizations asked the Terminal Company to join in submitting the disputes to the Adjustment Board.

The Terminal Company did not do so; the employees took the case there anyway, and then the Adjustment Board, following its usual procedure summoned the
304 Terminal Company to file its defense—and I think I had better, at this point, go into the procedure, which is followed by the Adjustment Board.

The procedure is described in the complaint, and certain of the rules of procedure are set forth as an exhibit—exhibit E, to the complaint.

The resolution of the Adjustment Board of June 18, 1935, provides as follows: that when a so-called "submission", which is the name given by the Board to the paper which constitutes the pleading of a party—they call that a "submission".

The resolution provides: "that when a submission of both parties to a dispute has been received by the Secretary of the Board, he will immediately furnish each of the parties with the submission of the other."

In other words, under their procedure, neither party sees the pleading of the other party until it has filed its own pleading; the Board announces to the prospective defendant that the employees have filed a claim in the case of John Jones, and calls upon the employer to file his submission, as his plea is called, within a certain period of time, and after he does so, then it furnishes him with a copy of the complaint which has been filed by the
305 plaintiff.

Neither party, in other words, under their rules sees the pleading of the other party until after it has filed its own pleading.

And, the next thing, to which I wish to call the attention of the Court in connection with that body is the vast importance of this paper called the "submission," because it is more than a pleading.

The resolution of the Board sets forth in exhibit E to the complaint, and states that with the filing of the two submissions, the case is completed; that any arguments presented to the Board at the so-called hearing must be confined to the facts stated in the two submissions, and then follow the very highly significant words, in connection with this so-called hearing: "The production of evidence at the hearing is foreclosed."

In other words, the only evidence before this body, if it can be properly called evidence, consists of the statements included in these papers called "submission", each of them prepared by one party without having seen the paper of the other party.

Obviously, there is thus given no opportunity whatever to either party to cross examine or otherwise test the
306 statements of the other party or to meet those statements by the introduction of contradictory statements through witnesses of its own.

The hearing before the Board consists merely of argument; upon these two ex parte statements, each of them prepared without sight of the other, and I submit that certainly the hearing of that kind is not a hearing in the sense that we are ordinarily accustomed to think of as a hearing in proceedings at law.

Now, there is a further feature of the Board's procedure to which attention must be called because it was followed in this case.

The Act provides four cases where the Board may fail to agree upon an award because it is evenly divided, and that situation occurs as it might be expected to do, with great frequency, it might, indeed, have been the intention of the framers of the Act that the two groups of members paid by the respective parties should give full effect to any prejudices that they might have in favor of their own side, and the defendants in their briefs state that that is done, and I call your attention particularly to the language at page 20 of the defendant's opening brief where they say:

307 "The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just, and he will prevail."

Well, of course, it was foreseen that that probably would not happen in many cases, and the Act goes on to provide that where the Board divides equally and a deadlock ensues, then the Board shall agree on a neutral referee, and that has proved to be seldom possible, so the Act then proceeds to provide that in such a case the Mediation Board shall appoint a referee to sit with the Board,—the Adjustment Board, and make an award.

Now, those provisions came into operation when the present dispute was submitted to the Adjustment Board; the Adjustment Board divided apparently fifty fifty, and a referee was appointed.

I therefore wish to call the Court's attention to the procedure that is followed at this state; when a referee is named to sit with this Adjustment Board because it is deadlocked, no opportunity is given whatever to the parties to appear before that referee to introduce evidence be-

308 fore the Board or even to make an argument before it, and the referee decides the case wholly on the basis of those ex-parte and self serving original "submissions" which were filed with the Board. The parties have no access to him and never appear before him, and that is

what was done in the present case. The Board deadlocked; a referee was appointed; the plaintiff was given no opportunity to present his argument before the referee and, in due course, the referee on behalf of the Board made an award in the laconic language: "claim sustained."

The defendants have spoken about findings of fact and the importance of having an opportunity, under section 3 (p) of the Act to use the Board's findings of fact as prima facie evidence.

There are no findings of fact here; there is nothing but the phrase "Claim sustained."

There was no opinion; no statement of argument or line of reasoning by which the Board arrived at its result; no discussion of the issues or of the rational processes by which the decision was arrived at.

Now, as I say, with that picture of this Adjustment Board before the Court; with that picture of its composition and membership and method of procedure, I submit that
309 comparisons and attempts to deal with the Board on the same basis as if it were the Interstate Commerce Commission must wholly fail.

What place has the Interstate Commerce Commission in a discussion of a body such as I have described? What possible analogy is there between such a body and the great quasi-judicial tribunal which proceeds with practically all of the safe-guards of a Court of law?

If this case raised an issue about an order of the Interstate Commerce Commission or an order of the Federal Trade Commission or an order of any of those other great quasi-judicial bodies, then we would not be making the argument we are making here, and there might be some grounds for the contentions of the defense by the defendants but I might say in this connection that we are not here in this Court asking the Court to review what the Adjustment Board did; we are simply saying that a body like the Adjustment Board, composed as it is, acting as it does, and employing the procedure that it employs—that the existence of a body of that kind and the fact that that body employing that procedure has reached what it calls an "award" does not impose any obstacle to the rights of the plaintiff in this case or the parties to the contract to have the meaning of that contract adjudicated according to its

legal significance in a court of law and according to
310 the forms and guarantees of legal procedure.

We are not saying that the awards of the Adjustment Board is something that we are here complaining about; we are here on our contract, and we are here on our contract because we take the position that the fact that there is such a body as the Adjustment Board, being the kind of body that it is, does not oust the Court of the jurisdiction they would otherwise have in the enforcement and protection of contract.

If the Adjustment Board were a different kind of body; if the Adjustment Board were differently constituted, or if it followed a different procedure then the case might be otherwise, but that case is not presented.

All that we have here is what we actually have—which is a body like the Adjustment Board acting in the manner in which it acts, and we say that the existence of that kind of a body acting in that kind of way cannot be held to oust the jurisdiction of the judicial courts.

If the Court pleases, that brings me about half way in my argument, and if you would care to have me continue for a few moments, I will do so.

The Court: May we not adjourn now and finish tomorrow morning?

Mr. Dickinson: I think the logical break in the ar-
311 gument occurs at this point.

The Court: We will adjourn until tomorrow morning at 10:00 o'clock.

Mr. Mulholland: May I ask if Your Honor has a copy of our reply brief? I was not informed that this is in the files; there should be three briefs.

The Court: Two of them are not so brief.

(Whereupon, at 3:20 o'clock p. m. of the same day, May 15, 1939, the hearing was continued until 10:00 o'clock the following day.)

312 Court House Building,
Washington, D. C.,
May 16, 1939

Hearing in the above-entitled matter was resumed, pursuant to the recess, at 10:20 o'clock a.m.,

Before O'Donoghue, J.

Appearances:
Same as heretofore noted.

313 *Argument of Mr. John Dickinson on Behalf of Plaintiff* (Continued)

Mr. Dickinson: If the Court please, at the point at which I interrupted my argument yesterday, I was describing the nature and composition and procedure of the so-called "Adjustment Board," an agency which proceeds without hearing and decides without making findings of fact.

I referred in particular to one sentence of the rules of the procedure of that Board to which I wish to again call your Honor's attention and which I wish to reemphasize this morning; it is printed at page 42 of the complaint, and I call Your Honor's special attention to it—a rule of the Adjustment Board which provides that introduction of evidence at the hearing is foreclosed—at page 42 of the complaint.

Now, however progressive one might be in one's legal thinking; however favorable to the rights of labor and however sympathetic with the development of administrative law and the powers of administrative tribunals, it seems clear that a body such as I have described goes a far distance beyond anything in the nature of a quasi-judicial tribunal that we have hitherto been familiar with in our constitutional system and, in order to complete the picture of this Adjustment Board, I would like to add a further stroke from the brief of our friends the defendants them-
314 selves, which will further serve to acquaint the Court with the characteristics of the Adjustment Board, the powers which it presumes to exercise and its conceptions of those powers which the defendants have.

Let me read a few sentences on page 67 of the defendant's main brief; that is, the thick blue brief, where they describe

the functions of this Board and what it is supposed to do; I refer to the paragraph beginning at the top of 67:

"The National Railroad Adjustment Board performs a function entirely different from that of the Courts."

Well, of course, that is clear; every quasi-judicial body performs functions different from that of courts and, consequently, that sentence in and of itself does nothing to emphasize the point that I am making, but let me go on:

"The parties before it, carrier and employees, are parties to a continuing relationship. The future of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally the consideration of present legal rights," - - -

And here comes the language to which I especially
315 call to your Honor's attention:

"But the Board's function is not to adjudicate as to the rights but to adjust the dispute regarding them in such manner that the parties may in future be enabled to conduct the business of Interstate Commerce without friction and without interruption."

"The Board's function is not to adjudicate as to the rights," and, in connection with that sentence, let me quote another sentence on the preceding page—page 66 of the same brief, which reads as follows:

"The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement."

"Not to make an interpretation of the agreement!"

Now, if your Honor please, that is the defendant's own language, and we submit that it is significant language because, if it means anything, it means that the function of this Adjustment Board is such that it has no legal obligation to construe and determine and apply the existing legal rights of the parties under their contracts—contracts that they have solemnly and voluntarily entered into, and contracts which are legal contracts in the eyes of the law, but that this Board, if it deems desirable may handle the dispute by disregarding those contracts and ignoring the rights under them and "adjust" or handle the disputes in the
manner which in its own uncontrolled discretion it
316 regards as conducive to the future relationships of the parties.

Now, that is what the Board has done here in our case; the Board has gone beyond the terms of the contract and, because it apparently cherishes an ideal or theory that it will be a good thing for all of the railroads of the country if they were to have a strict limitation of the working road crews, so that they may not be permitted to do anything, no matter how simple and natural, in and about the yards, in order to give effect to that theory of what the Board regards as a "good thing" for the railroad industry as a whole throughout the country, they have gone beyond the terms of the contract and they have disregarded the legal rights of the parties, and the defendants now come into Court and, in this language which I have read, say that as a matter of fact that is what the Board is there to do.

Clearly, an agency of that kind is something new in the great galazy of administrative tribunals with which we are becoming more and more familiar; something new even in that new field, and none of the precedents which are available from the decided cases as to quasi-judicial tribunals and the manner of reviewing their orders have any application to the existence of this kind of a body which I have been describing.

317 Now, at this point, let me recur to the point which I undertook to make yesterday—that the plaintiffs here are not seeking to review the action of this Adjustment Board; we are in accord on our contract, and the only way in which the Adjustment Board comes into the picture is in connection with whether or not the fact that it is there has raised a bar to an action on a contract that we otherwise would have, and the defendants agree that we are in accord on the contract.

They say, on the bottom of page 51, for example, that these claims which we are contesting—claims made by the employees—are claims "based upon the agreement of 1923—not upon the order of the Board."

That is at the bottom of page 51 of the main brief and, as a matter of fact, we have set forth in our own brief, in the first section, pages 2 and 3, repeated statements from the brief of the defendants in which they admit that this is an action upon a contract.

So that, as I say, the only way in which the award of this Board is involved is in connection with the question as to

whether or not it interposes a bar to a form of proceeding that otherwise would clearly lie.

Now, it seemed to me in the brief colloquy which I had with counsel for the defendants yesterday, that they
318 are reluctant themselves to urge that the existence of this award of the Adjustment Board ousts in and of itself the jusisdiction of the Courts to entertain this proceeding.

They shift their ground; they do not go that far, but they say, as I understand them, that it is not the existence of the award of the Adjustment Board that ousts the Court's jurisdiction here, but this section (p) of the statute; it is the provisions of section 3 (p) of the statute which they claim has the effect of ousting the Court's jurisdiction here, and therefore I wish to invite the Court's attention to section 3 (p) which, as your Honor may remember, provides that if the carrier does not comply with the award of the Board, the employees in whose favor the award is issued may bring an action in a District Court in which action they will have special procedural advantages of certain kinds and the argument advanced by the defendants is that since an employee may bring a proceeding under section 3 (p) that therefore the Courts are permanently closed to any proceeding by the employer, and they undertake to base that argument upon the familiar analogy in the case of quasi-judicial administrative bodies that where there is some special statutory review procedure provided for an administrative determination, that the determination can
319 only be reviewed in accordance with that special statutory procedure. Now, it seems to me that that argument would not hold water for two conclusive reasons, and the first of those, to which I have already referred is that, of course, this body—this Adjustment Board—is not a quasi-judicial tribunal; its orders are not quasi-judicial determinations, and there is nothing that can properly be reviewed by any Court under statutory review procedure or otherwise because the Board makes no record, the Board makes no findings and, consequently, there is not that basis for a review under statutory procedure which exists in the case of orders of bodies like the Interstate Commerce Commission and the Communications Commission and similar tribunals.

The second point is that the defendants themselves, in their main brief, assert on their own motion that this procedure under section 3 (p) of the statute is not a review procedure, and I would like to call the Court's attention again to their blue brief at page 9, about half way down the page, where they say:

"In other words, the procedure established by the Act is not a procedure for review."

In other words, that the procedure established by the Act, namely, the procedure under section 3 (p) is not a procedure for review, and then they go ahead in the next
320 argument and say that that is the reason why we cannot maintain our present action because we are seeking to get the review "as the gist of the plaintiff's action in this case is to secure such review, its complaint is fatally defective."

In other words, the reason they say we cannot have an action here is because section 3 (p) does not provide for the review.

Now, then, whatever inconsistency there may be in that statement of theirs—inconsistency with the balance of the argument, I think on the whole that throughout their brief they do present a consistent and convincing picture of the nature of the procedure under section 3 (p), and I am going to rely entirely on what I say about section 3 (p) on the analysis of that procedure which is contained in this blue brief of the defendants between pages 49 and 54 because we, on the part of the plaintiff, agree fully with that analysis, and let me begin by reading the language used by the defendants on the top of page 53 as follows:

"Although the statute speaks of the action"—that is to say, the action under section 3 (p)—"as one to enforce an order of the Board, and although the procuring of such an order is undoubtedly a prerequisite to the use of the statutory procedure, it is apparent that the mere existence
of the order in no sense establishes that plaintiff in
321 such a suit has a cause of action. He must plead more than the order. He must prove more, and a judgment of enforcement by no means follows as a matter of course from the order's issuance. His cause of action before the Court"—that is, under section 3 (p)—"is dependent upon the agreement out of the interpretation of

which the alleged dispute arose. The existence of the order of the Board merely assists him in preparing and proving that cause of action," and I repeat, I call especial attention again to the language, "his cause of action before the Court (under section 3 (p)) is dependent upon the agreement out of the interpretation of which the alleged dispute arose." Now, those are the defendants own words, and they state as plainly as language can state that the procedure under section 3 (p) is a proceeding upon the agreement—a proceeding on the original contract between the parties in which this so-called order or award has no probative effect; has only the effect of assisting, as they put it, the plaintiff to prepare his case.

The section 3 (p) procedure is a special variety of suit on a contract, conditioned upon their having been a previous order of the Board and offering unusual and special attractiveness to the employees in order to induce them to bring that form of action for reasons that I will go into before I conclude my argument.

322 Now, the defendants are not content to leave the matter there; they spell out still further why this proceeding under section 3, (p) is not a proceeding on an order or award, but is a proceeding on an original contract, and the reason why they say it is on an original contract and not on the order is apparent from some language on page 53 of their brief.

They are talking about these claims by the defendants in this case which constitute the reason why we are in Court, and they say that those individual defendants, in making their claims, base the claims on the contract of 1923, and not on the award of the Board, and they go on to say this: "Plaintiff has failed to show how the existence of the Board's order affects its legal rights in any way."

We fail to show it because, as a matter of fact, we don't think it "affects our legal rights in any way". They say further: "the plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued."

And that is exactly what we think. "If this Court should, without more, grant a declaratory judgment holding the order of the Board invalid, the plaintiff would still be in the same position in this regard."

We do not ask the Court to grant a declaratory
323 judgment on the order.

"The plaintiff would still be in the same position", but the language I specially wish to emphasize is that sentence: "The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued."

That is right, and that is why the procedure under section 3 (p) must be a procedure on the contract and not upon this order; it does not create or effect or alter legal rights according to the defendants' own contention, and one final sentence from their brief on that point to which I wish to refer is to be found on turning over the page about half way down page 54 where they say in parentheses—"(for the reason that the order establishes no rights.)"

Now, if this order establishes no rights; if it affects no rights, clearly section 3 (p) cannot be a proceeding to enforce the order and that, no doubt, is why they said, on page 9, that it was not a proceeding to enforce the order.

It is a procedure on a contract in which this Board has the function of assisting the plaintiff to prepare and prove his case, as they say, and if that is the only effect that the award has, clearly a suit under section 3 (p) is a
324 suit on the contract, and so what we have got here is the question of whether or not the special statutory suit on a contract provided by section 3 (p) is of such a nature and so exclusive as to oust the jurisdiction of the Court to entertain all other kinds of remedies on the contract—that is the real issue—it is not an issue between the statutory review procedure of a quasi-judicial administrative order as against the declaratory judgments procedure, but it is a question of whether or not one form of statutory procedure upon a contract, namely, under section 3 (p), is to be held exclusive in such a case as to exclude other remedies on the contract.

Now, one question that might very well arise in your mind as to why the defendants should take this position is that if the award by the Adjustment Board is really, from a legal standpoint, such a tenuous thing as they say it is—why should they take the position that the order or award of this Board creates no rights and affects no rights and leaves the parties in exactly the same position in which they were before the award was made?

Well, I think the answer is pretty clear; I think the explanation is pretty clear.

In the light of the description which I have given
325 here of the composition of this Board and of the manner in which it proceeds and the regard, or lack of regard in which it holds judicial procedural requirements, it seems entirely clear that the defendants are really unwilling to come into Court and expose themselves and expose this Board to the charge which would certainly have to be made of flagrant unconstitutionality if an attempt were made to argue that the awards of this Board constituted binding adjudications of rights.

The point would be so clear that it would admit of no answer, and that is why they take refuge in the position that the awards really do not affect legal rights, and that is why they have to say that the procedure under section 3 (p) is not a procedure to enforce the award; that it establishes and affects no rights, but it is simply a procedure on a contract in the course of which the award operates "to assist the plaintiff in preparing and proving his case."

Now, with that point established, what possible ground is there for argument that section 3 (p) establishes any exclusive remedy on a contract of employment so as to oust other forms of remedy including the declaratory judgment procedure?

There is no possible ground for arguing that it
326 operates to exclude the declaratory judgment procedure unless it is exclusive in such a sense as to exclude all other remedies on the contract, and what possible ground is there for arguing that section 3 (p) has that effect?

As a matter of fact, it is at variance with the whole theory of section 3 (p) which is advanced in the defendant's brief.

They say, for example, that the rights of the parties today under their contract or what they were before the award.

They say that the award has no effect on those rights and they say that all that section 3 (p) does is to give a special remedy to one of the parties.

Now, how can you say that an option which is given to one of the two parties on a contract to bring a suit would be procedure to enforce that contract and operate to exclude

all other remedies on the contract and operate to exclude the other party to a contract from having any opportunity to come into Court on it at all.

Now, the very idea of exclusiveness seems to imply that a party may not use one remedy because another remedy has been given to him but if, instead, the other remedy,—the section 3 (p) remedy is given, not to him, but to somebody else—how can he be said to be excluded by a remedy which is not available to him at all?

327 And I submit that to apply or construe section 3 (p) as an exclusive remedy on the basis on any such reasoning as that would be to block the principle of statutory construction and, after all, this is simply a question of statutory construction—that would be novel and unheard of and contrary to the most elementary notions of fair dealing and justice.

Now, let us come at this point to the argument which the defendants made yesterday and which they make in their briefs, that if the procedure under section 3 (p) is not held to be exclusive, they will be deprived of certain valuable rights which would be available to them if the procedure under section 3 (p) were exclusive.

Your Honor may remember that I interrupted Mr. McEwen to ask what rights he had in mind and he said he had in mind the special procedural advantages which are given to the employees who bring a proceeding under section 3 (p), and that section does give certain procedural advantages to the complaining employee which I will enumerate in a moment, so that their argument is that if it is held that the declaratory procedure judgment will lie, so that the employer may become the plaintiff, as he is in a declaratory judgment proceeding, the employees will be deprived of the advantages which they would have of

328 being the plaintiffs in a proceeding under section 3 (p).

Now, what are the special procedural advantages? They are four in number:

The Act provides that a proceeding under section 3 (p) may be brought in a District Court in the United States for the District in which he resides or in which is located the principal operating office of the carrier or through which the carrier operates.

In other words, if an employee brings a proceeding under section 3 (p) he has a fairly wide range of Federal judicial Districts to choose from.

He has the advantage of a wide choice of fora.

Then, the second advantage that they referred to is the two year statute of limitation; they say that if they sue under section 3 (p) they do not have to make up their mind as to whether or not to sue for two years because the statute gives them the right to sue for that entire period.

The third advantage is that in a suit brought under section 3 (p), if the complaining employee wins, he is entitled to recover attorney's fees.

And, finally, if he loses in such a proceeding he will not have to pay costs, but costs will be paid for by the
329 United States.

They say that those advantages are guaranteed to them if they sue under section 3 (p), but, of course, in order to get those advantages they have to bring the suit themselves as plaintiffs and, therefore, if the Court should hold that the defendant may sue in a declaratory judgment proceeding, of course, the employees would no longer be in a position of plaintiff and would not, they say, be in a position to claim those advantages.

Now, if Your Honor please, I submit that if you look at that argument, namely, that a declaratory judgment proceeding will not lie if it operates to deprive the other party of advantages which the other party would have if he sued as plaintiff—if you look at that argument and if that argument should be considered to be sound, it would have the effect of destroying the declaratory judgment procedure in practically every case to which it is applicable because the very purpose of the declaratory judgment procedure is to enable a prospective defendant to make himself the plaintiff, and, by so doing, deprive the original plaintiff of advantages which every plaintiff in a law suit always has, and let me illustrate:

Take, first of all, this matter of the selection of
330 a forum. Now, the plaintiff selects the forum; he has the advantage of doing that, but if a declaratory judgment procedure is introduced, as it has been, so that the party who would otherwise be the defendant may put himself in the position of a plaintiff, why, then, he may

select the forum and, to that extent, destroy the advantages that the original plaintiff would have of selecting the forum, and the same thing is true about the statute of limitations.

The defendants seem to regard this two year statute of limitation as a guarantee of freedom from litigation for two years.

Well, now, anybody—any prospective defendant who brings a declaratory judgment proceeding cuts off the advantage that the original plaintiff might have of sleeping on his rights during the entire period of the statute of limitations, and with regard to those attorney's fees and costs, there, again, all that would happen here, if the declaratory judgment procedure would be held to be applicable, would be exactly the same thing that happens whenever the declaratory judgment procedure is followed, namely, that if the prospective defendant is foolish enough to turn himself into a plaintiff under the declaratory judgment procedure, he thereby cuts off the rights and advantages which
331 the original plaintiff might have had had he sued as the plaintiff, and which he could have obtained by suing promptly and diligently, and I might suggest in passing that in this case, under the Federal rules, and under the statute, I see no reason myself why these defendants here could not right here and now obtain for themselves all of those advantages under section 3 (p) by filing a bill in the nature of a cross bill or a bill which should be consolidated with the present action under section 3 (p), to enforce the award of the Board or to enforce the contract in the light of the award of the Board. I see no objection to that at all.

And, of course, under those circumstances, if they win, they can get the attorney's fees, and, if they lose, the United States Treasury would pay the costs, so that they would not really be deprived of anything.

So that those supposed disadvantages to the defendant which they claim would accrue—this supposed deprivation of rights which they claim would accrue as a result of holding that this declaratory judgment procedure is applicable, turns out to be not merely trivial and unimportant but actually non-existent but, if your Honor please, even if those disadvantages to the defendants, instead of being trivial and unimportant and non-existent were really and

actually, what are we to say as to their weight in
332 the balance as compared with other and more momentous disadvantages which would follow, not merely to plaintiffs here, not merely to the railroads, but to pretty fundamental principles, if it should be held that the plaintiff has no access to the Courts in this proceeding?

This case really involves a grave question; it is a question which goes down below the important question of labor relations and of labor policies; it goes down below those issues, if the Court please, to the question of whether or not in our domestic law—in the law of the land—as seems to be happening in the field of international law—the maxim that pacts are to be acted upon is to become a dead letter and a thing of the past, and I want for a moment to point out to the Court the consequences of the argument that the defendants are advancing here.

Now, that argument rests upon three propositions, as I see it:

The first proposition is that the Railroad Adjustment Board is not a judicial, or even a quasi-judicial body; that it is a body which, in making its awards, is perfectly free to ignore the existing contracts of the parties and make a settlement in what it regards as the best interests of
333 the parties, and that in doing so, of course, it can readjust the relationship between the parties in such a way as to cut off their right to enjoy their contract right, and that the Adjustment Board, being that kind of a body and, in spite of its non-judicial character, and in spite of the fact that it does not even pretend to give effect to contract rights, nevertheless, if that Board has made an award, even though the award does not have any effect on the contract rights of the parties, it does have the effect of barring permanently and completely the right of the employer to come into Court and ask for an interpretation and enforcement of his contract.

And the third proposition is that the other party—the employee—may come into Court under the specially advantageous procedure of section 3 (p) and enforce his rights under the contract if he wants to do so.

That is what the argument really comes down to—that the award of the Labor Board does not create legal rights; oh, no; it does not affect legal rights—oh, no—but what it

does do, once it has been made, is to bar the right of one of the two parties to the contract to any judicial remedy on that contract and leave the door open simply as a remedy to the other party on the contract if that party wants to resort to the Courts, for the enforcement of its con-
334 tract rights.

The effect which they give to an award of this non-judicial body is as an estoppel; it comes in and stops; cuts off, bars, blocks, the right of one of the two parties to the contract forever to judicial relief.

Now, let us look at what the practical consequences of that scheme of procedure would be:

If a carrier has a contract with a group of employees and if, thereafter, the employees, as human beings sometimes have a way of doing, advance claims which are entirely beyond the scope of the contract and are unsupported by it, then those employees can, against the will of the carrier, under section 3 (i) of the Act take the dispute to the Adjustment Board and the Board, in making its decision, is not bound by the contract but simply bound by what it regards as the best interests of the future relationships of the industry and, after the Board has done that, say the defendants, the Courts are thereafter closed to the carrier to enforce any rights or to ask for the interpretation of any rights under the contract.

Now, what can be the object and what possibly can be said in defence of any such scheme of procedure as that, which would make the action of an irresponsible and non-judicial body effective to bar one of the two parties to the contract from any rights upon its contract?

335 Why, obviously, the whole object, if not the only object is to limit effective resort to the Courts by employers for the determination of their legal rights under their contracts with their employees.

The scheme amounts to establishing a device whereby one party to a contract, namely, the employer party to the contract, can be barred of access to the contract by an unilateral one sided action of the other party to the contract in taking a case before the Adjustment Board.

Now, why are the defendants so anxious to bar access of the plaintiff to the Courts? I think the answer appears in a sentence at page 37 of their main brief—a sentence

that I might describe as an ominous sentence—the fourth line on page 37: "The orders of the Board find their primary sanction in the collective economic bargaining power of the employers,"—an euphemism of the right to strike.

The defendants frankly say that according to their construction of the Act, they can keep the employer out of Court by going to the Adjustment Board and that they themselves regard the right to strike as the primary sanction of the orders of the Board instead of going into Court under the procedure that is available to them under section 3 (p).

Obviously, if the Court please, they have no interest in getting into Court under section 3 (p), and the reason is clear: they say that the Adjustment Board may make an award that can disregard and go beyond the terms of the contract.

Now, if the Adjustment Board has made an award in their favor which disregards and goes beyond the terms of the contract, and if they went into Court under section 3 (p) on the contract, as they say they would have to do, the Court would obviously act upon the award to the measure of the contract and, therefore, there is no inducement to them to do so; there is every inducement the other way—against their submitting awards to a judicial determination under section 3 (p), and yet they say that we ought not to be allowed to go into Court because they have a right to go into Court under section 3 (p), and that our rights will be sufficiently taken care of if we sit back and wait for them to go into Court under section 3 (p)—wait, your Honor, until the vexations of the spirit can no longer endure—they will never go into Court under section 3 (p) because if the award is the kind of award they like, it is an award that goes beyond the terms of the contract, and they know perfectly well that if they go into Court under section 3 (p), the Court will cut the award down to the measure of the contract, so where are our legal rights going to be protected in court?

Our rights are threatened. They say, as a matter of fact, "what are we worried about?" We are worried about the claims that these employees are putting in every week, claiming pay for work that they have not done. That is why we brought this suit; we brought this suit because

those yard employees, at the end of every week, put in a bill for not doing the work of moving those trains, and that because those trains are being moved by the road engines, and the bills are piling up and accumulating; we have got to save money to meet them, and that is precisely the kind of situation that the Declaratory Judgments Act was meant to save plaintiffs from having to undergo.

Oh, no; we cannot depend for the determination of our legal rights upon waiting until the defendants bring a proceeding under section 3 (p). They know why they won't bring a proceeding under section 3 (p), and the question simply is whether or not there is open to us our access to the courts like any other citizen, to come in under this Declaratory Judgments Act and ask the court to determine for us the proper construction of a contract under which the claims for money payments are being insistently made against us which we claim are not due under the contract.

Well, now, going back to the question of the funda-
338 mental nature of the procedure for which the defendants are arguing here.

They say, as I indicated a moment or two ago, that so far as relates to the employer, he has no right to go into Court. His right is barred by the approach which has been made to the Adjustment Board and that, as far as they are concerned, the employees, from their standpoint, the orders of the Board find their primary sanction in the right to strike.

Now, that is the whole heart of the matter, and what it means is that the scheme of procedure that the defendants are asking this Court to accept and construe as the procedure provided by the Railway Labor Act, is a procedure which denies forever the legal enforcement of a contract by one of the two parties to the contract and leaves the other party to the contract free to inforce its claims by the right to strike, and I submit that no scheme of procedure could be imagined that would more effectively eliminate the importance of the decision of controversies according to law and according to legal justice than that kind of procedure.

It may be, of course, that we are entering upon a period inside of nations, as well as among nations, where the notion that issues ought to be settled in accordance with justice and in accordance with law and in accordance
339 with the plighted word of the parties is falling into

disrepute, and that we are becoming infected everywhere with the idea that all disputes should be settled by force.

Certainly, the defendants' brief is replete with expressions of dislike and distrust of the courts. At the bottom of page 66 of this brief they say, as a matter of fact, that court procedure in accordance with the methods of legal justice is not a satisfactory way to settle disputes—the last sentence beginning on that page:

"It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future."

Well, I don't know, but are we to suppose that "cordial relationships between the parties in the future," will be promoted by the insistence upon the primary sanction of collective economic bargaining power?

And then they say, at page 43 of their brief that if they are compelled to submit the awards of the Adjustment Board to the adjudication of the courts, which is a matter that we are not asking them to do at all anyway—

340 then, they say:

"The result would be an increasing unwillingness"—down at the bottom of the page—"unwillingness on the part of the employees to submit disputes to the Board and an increasing resort by them to the familiar weapons of industrial warfare as a means of securing adjustments of their disputes."

In other words, they would rather fight it out than to go to Court.

It reminds me of a remark of the late Will Rogers about an international controversy; he said: "We were so sure that our cause was just that we simply refused to submit it to judicial procedure."

Now, reading that statement that I have just read there about increasing resort to the familiar weapons of industrial warfare—reading that together with the statement that the orders and awards of the Adjustment Board find their primary sanction in the right to strike, the apparent meaning is this, and I could get no other meaning out of it,

that the employees will consent to go before the Adjustment Board only if it is understood that they shall be in a position to enforce the orders of the Board by their right to strike but that if, on the other hand, the way is open to the other party to obtain a judicial determination of his rights under his contract, then the employers will not go be-
341 fore the Board at all but will strike in the first instance.

If such a view as that is accepted, it seems to me that contracts arrived at by collective bargaining between employers and employees mean only what the collective bargaining power of the employers can make them mean.

Under such a view, contracts arrived at by collective bargaining between employers and employees, if the Court please, are mere "scraps of paper".

If there is no legal way of enforcing rights under a contract then, from any legal standpoint, there is no legal contract, and if the door is closed to the employer having a legal remedy on his contract why, obviously, if, in addition to that you add the element of this threat to strike, the contracts between the employer and the employee are not contracts at all but they are simply whatever economic pressure the employers from time to time can bring to bear upon the employer—whatever that economic pressure can make those contracts mean and, in this day, when so much is said about the collective bargaining and so much emphasis is laid upon its importance, and the appeal to justice is made that rights of collective bargaining should be exercised, it does not seem to me to lie in the mouth of the employees to come into Court and claim that the statutes which guaran-
342 tee and protect the right of collective bargaining are to be so construed as to exclude the employer party to the bargain from having any legal right on his contract, and that is why as I said to the Court a moment or two ago, it seems to me that this case raises a very deep and fundamental issue.

The question is whether or not railroad employers under collective bargaining agreements, have any rights to judicial remedy and judicial protection to their contracts.

If they have such rights they can, under the statutory situation, only be protected by holding that this action will lie, and if the action will not lie, then contracts between a

carrier and its employees are not in contemplation of law contracts under which the employer has any legal rights at all.

Now, there is just one other point that I would like briefly to bring to the attention of the Court, and I refer to defendant's argument advanced here yesterday that if the declaratory judgment procedure is held to be available to employers under their contract, that then the scheme and policy intended by Congress in the Railway Labor Act will be defeated and destroyed.

As I said at the very beginning of my argument,
343 we are not here to defeat or to destroy any power or policy of Congress; we are not here to defeat or destroy anything which guarantees collective bargaining or the rights of labor.

We decline to accept the view that the policy of the Congress would be destroyed by holding that one of the parties to a contract has a legal remedy on that contract where the other party has no legal remedy because we are inclined to believe that Congress by the Railway Labor Act, intended to adopt a policy or prescribe a scheme of procedure which makes collective bargaining a sham and a mere mask for unrestricted economic pressure.

On the contrary, I believe that the provisions of the Railway Labor Act, if read with care and if properly understood, disclose an altogether different policy and purpose on the part of Congress, a policy and purpose which would be effectuated and aided if it is held that the present action may be maintained.

The purpose of the Railway Labor Act can not be understood in any such miserable and paltry and discreditable way as to imagine that its object is to throw obstacles in the way of resort to judicial procedure.

That is not the purpose of the Act; it has a larger and more beneficient purpose; it has a purpose which is
344 apparent throughout all of its provisions, which gives to those provisions an effect and meaning that they otherwise would not have, and that purpose is to place restrictions around, and regulations around, and limitations upon—while not of course abolishing the right to strike—if you will read the Act from cover to cover, it seems to me that the only basic, sensible, intelligent view that can be

obtained of its purpose is that through all of its provisions it is aiming, not to abolish the ultimate right to strike but to hedge it about with provisions which will lessen the likelihood that it will be resorted to.

That is the purpose of the Railway Labor Act, and not the establishment of blocks against resort to judicial procedure.

For example, there can be no doubt whatever that those provisions of the Railway Labor Act which deal with the Mediation Board and which describe the powers and purposes of the Mediation Board—a very different body from this Adjustment Board—have as its purpose the interposition of obstacles in the way of the right to strike.

When the carriers cannot agree on wages or working conditions, or when one side—the employees or the carriers' ask for a change in the contract rights, then the ma-
345 chinery of the Mediation Board comes into play, and provision after provision is piled up in the Act, designed to place obstacle after obstacle, and delay on delay in the pathway of reaching that ultimate point of disagreement where the right to strike becomes effective.

I submit that if we look at the provisions of the Railway Labor Act with regard to the Adjustment Board we will reach precisely the same objective. These small grievances and controversies which are to go to the Adjustment Board may conceivably lead to differences which if unsettled will bring into play a resort to the right to strike.

That is perfectly true and, so, in the first instance, the Act sets up the Adjustment Board and then the Act goes further: suppose that after the Adjustment Board has acted, the dispute continues—what is the action then? There is where section 3 (p) comes in; the Act holds out a bait; it holds out an inducement; it holds out a specially persuasive appeal to the employee, if he wants to use it, to come into Court and settle his disputes there instead of resorting to this collective economic bargaining power which they now come in and say is the "primary sanction" of the awards of the Adjustment Board.

Now, I think that if section 3 (p) is understood in
346 that light, it seems clear that it has no such effect and need have any such effect as defendants claim

that it has in excluding other forms of judicial remedies that are available.

If section 3 (p) is an inducement or an attempted inducement, weak though it may be to the employees to resort to Court procedure because they are given special advantages, why in the world does the holding out of that inducement affect in any way or how can it be supposed to affect the availability of other forms of legal procedure to the other parties to the contract when, as a matter of fact, a denial of those other forms of procedure to the other party to the contract would amount, as I have shown, to a total and complete denial of his right to have legal relief on his contract.

It seems to me, that the Railroad Labor Act is a statute of peace and not a statute of strife; that its every provision is designed so far as possible to substitute some form of settlement by law and justice for a settlement by force and violence and, certainly, we are not going to accomplish that result by bottling up access to the judicial tribunals and by holding that a party to a contract is completely excluded from any right of access to the courts to give him his rights under the contract.

The Court: Mr. Dickinson, the plaintiff does not
347 contend here that this Act is unconstitutional.

Mr. Dickinson: No.

The Court: That is not the purpose of the complaint?

Mr. Dickinson: No, not at all.

The Court: Suppose either party submits a "submission", as it is called, to this Adjustment Board, and suppose the decision is in favor of the employer or the carrier and the railroad company attempts to enforce that, how can they do it if the employees won't abide by it?

Mr. Dickinson: Under those circumstances I suppose that the railroad company would certainly have the right to such legal remedies as are available; for example, if the Board decided that only a certain sum of money was due from week to week to a particular class of employees, and the employees continued to demand more, the railroad would be protected if it only paid them the amount that the Board said it had to pay them, and if they would not work for that why, they would leave.

The Court: Be dismissed?

Mr. Dickinson: Yes.

The Court: So that, plainly, if the decision of the Adjustment Board is in favor of the railroad, the railroad does not need any legal remedy; it has the actual remedy of refusing to let them work less hours—

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Mr. Dickinson: (Interposing) Of course—if I may interrupt your Honor at this moment, it seems to me—

The Court: (Interposing) They have the absolute power over the employers, have they not?

Mr. Dickinson: Railroad company has an absolute power over the employers?

The Court: Yes.

Mr. Dickinson: I don't think so. It seems to me, for example, that if a decision of this Adjustment Board departed from the contract between the employer and the employees, in a sense adversely to the employees—in other words, if the Board went ahead and made a decision that was adverse to the employees, that the employees, in the event that they in any way thought they were damaged by that decision, would have exactly the same right to come into Court for a declaration of their rights under the contract that the plaintiff has here.

The Court: I don't understand that defendants claim any such right as that.

Mr. Dickinson: No, they don't; they say they have not any such right, but my point is that section 3 (p) of the Act establishes a very special kind of procedure which has nothing to say, one way or another, about the availability of what you might call the general legal remedies.

349

The Court: I want to get your view point on that. Now, then, you spoke about the legal remedy afforded to labor under section 3(p); that is only where the decision is in favor of the employees and against the employer?

Mr. Dickinson: That is right.

The Court: Now, is that a legal remedy under section 3 (p) or is it a proceeding in Court by way of getting execution on the award by arbitration against them?

Mr. Dickinson: I would like to say two things in that connection, Your Honor; in the first place, the defendants, having insisted, as I developed for you in my argument, that a proceeding under section 3 (p) is not a proceeding in execution of an award or to enforce the award; that it is

a proceeding, as they say, on the contract, but I would like to say a word about this matter of arbitration: I think it might be significant to note that the defendants have in no way advanced the claim that this Adjustment Board is an agency of compulsory arbitration, and I suspect that if the history of those forces which were at work when the Act was framed were investigated it would be found that the labor champions in this country are extremely loathe to advocate anything which might be
350 construed as compulsory arbitration.

The Court: What meaning would you put upon the awards?

Mr. Dickinson: The meaning that I would put upon the award would be that the award shall be final and binding upon both—

The Court: (Interposing) Both parties to the dispute?

Mr. Dickinson: Well, as a matter of fact—

The Court: (Interposing) What does the word "final" mean?

Mr. Dickinson: If your Honor please, there has been a great deal of dispute as to that word, even before the Act was passed. It reminds me a little of the debate in the Constitutional Convention on the question of direct taxes. There is one sentence in there which reads as follows: "Mr. Kind inquired what was meant by the words "direct taxes" and no one answered.

Now, this question of what is meant by the words "final" and "binding" has been raised from time to time, and no one has answered, but I certainly don't think it can be maintained that this statute is a compulsory arbitration statute for this reason:

351 The very idea of arbitration, in a way, involves both parties coming into the arbitration. Now, here this Board can make an award on a motion of one party and, certainly, if you set up a Board and give it power to determine conclusively the rights and obligations of another party who does not submit to the Board and who does not appear before it, then I think there would be a question of the constitutionality of the Act; I would challenge it immediately.

The Court: That is the first question; that is, if one party would invoke this Board's action, and if the other

party does not care to go in, the question comes up, what right does he have?

Mr. Dickinson: And can it constitutionally do so?

The Court: It says they must; that comes to the fundamental question that you say is so important as to the new and modern way, which regards itself as having an interest in such matters; that might even be superior to the contract of the two contracting parties and their respective rights, and so on.

Mr. Dickinson: Yes. However, as to the power of Congress, I certainly think it would be beyond anything that has been decided to pass a statute that would enable a Board consisting of those private people to wipe out con-
352 tracts and impose new obligations on people.

The Court: That is a question that is in the air not only in this country but in other countries,—the modern commissions and the set up in regard to handling labor relations, private contract relations, working relations, and so forth and so on.

Mr. Dickinson: In what country?

The Court: Spain.

Mr. Dickinson: Spain?

The Court: Yes, and recently in Brazil; it is surprising to see how far other countries are taking up the same principles that this country was founded on, and are taking up these matters and going further.

Mr. Dickinson: Brazil is a facist country.

The Court: Whatever it may be, there is an idea, and it is in the Congress, and it is in the Acts of Congress and in these different Boards, and so on.

Mr. Dickinson: But like so many other questions, it is a question of degree how far they can go and still leave something of the Constitution.

The Court: I appreciate your argument, and it has been very helpful, but I will not decide this question now; it is an important basic question.

Mr. Dickinson: It is pretty basic.

353 The Court: Yes.

Reply Argument of Mr. Willard H. McEwen on Behalf of Defendants

Mr. McEwen: If the Court please, the style of argument that has been adopted by plaintiff's counsel in this matter, renders it necessary that we go back and inquire into the fundamental principles upon which the defendants' case is built, and discuss those briefly, for I believe that there has been throughout the hearing a basic misconception of the defendants' arguments on the part of plaintiff's counsel.

We have been accused of many things, and if I felt—if I had the legal theories and had expressed them in this Court—all of those of which I have been accused, I think I would be a little ashamed of myself, but the questions involved in the defendants argument which we have attempted to impress upon the Court are not the bolshevist ideas of which plaintiff has accused us.

In the first place, it is our desire that the legal rights of carriers should receive no legal protection at the hands of the courts or otherwise; I think your Honor should realize the exact situation which is involved in the protection of contract rights and in the enforcement of contracts entered into between carriers and employees. The negotia-
354 tions as I pointed out to your Honor, yesterday, are joint.

Now, under a system where there is no central tribunal to decide a dispute, the administration of the contract is not joint, but it is a single administration vested primarily in the employer. It is the employer, in the first instance who says this is the way the contract shall be interpreted; this is the way the contract shall be applied, "for it is the carrier which inevitably and necessarily, under the conditions of the past, makes the application of the contract.

The carriers' legal rights under a contract, therefore, cannot be infringed upon unless the carrier itself is forced to adopt the policy of application of its agreements contrary to that which it has itself established and, if force is directed against it, you change this application, it has been found to be a wrongful force.

Now, applying that situation to the present case, what do we find? The Washington Terminal Company has an agreement which its able counsel says it has applied since 1923.

Mr. Dickinson: Since 1908.

Mr. McEwen: The actual agreement between the Brotherhoods and the carriers dates from 1923; prior to that the documents were referred to as agreements.

355 I believe also, Mr. Dickinson, that we made a little agreement, did we not, with regard to the matter of interruptions which I have kept throughout your long and very brilliant argument.

Mr. Dickinson: Yes.

Mr. McEwen: The employer has placed that agreement in effect; it is now in effect; the employer—the only damage that it claims is possible to it is the piling up of claims which it asserts have begun to develop since a certain award was made by the Adjustment Board.

Now, it is conceded that under the Railway Labor Act, your Honor, the employees have the sole right to come into Court and seek judicial enforcement of that award; they have the sole right to seek an order of the Court which will have the effect of coercing the carrier into changing its present operating practices but that right, your Honor, is limited to a period of two years; if it is not exercised within that period of two years, it is lost.

The carriers' protection of its legal rights depends solely on its waiting on the two year period and if, at the end of that time, no action is enforced against it, its operating practices may be continued without regard to the award of the Adjustment Board.

356 So that the terrible blow which is being dealt to the legal protection of plaintiff's agreement according to its argument, is after all not such a serious blow.

Now, in my opinion, it has been persistently argued by plaintiff that the functions of the Adjustment Board, according to our position, is not to interpret contracts, but to make new ones. This principle; this conclusion from certain language contained in our brief which was directed, of course, if the Court please, as the Court will see on further examination into the question of whether or not a power vested in the Adjustment Board is a judicial power or an administrative power—an issue, incidentally, your Honor, which is no longer before the courts, for the defendants, in the first instance, raised the question of the constitutionality of the Railway Labor Act as a vesting of judicial power in a non-judicial body—a question which is not now

presented to the Court in argument and is not presented in the plaintiff's brief, but it was the contention of the defendants that it was the purpose of the Adjustment Board and the purpose of the statute in establishing this Board, to provide for something more than the present interpretation of agreements; that is inherent, of course, in the Board's authority and in its jurisdiction; that is its function.
357 I should say that is its narrower function, but that function must be correlated to its larger purpose of securing industrial peace on the railroads—a function to which the Board cannot be blind.

Now, our argument amounts to this; that the Board in examining the contracts which were brought before it; in examining the interpretations which the carriers themselves had put upon those contracts, and in determining whether or not those interpretations were correct, the Board may legitimately give consideration to the basis purposes of the Act and the administrative purposes for which it was established—that is the preservation of industrial peace.

Now, that is not different materially from the same situation in regard to the Interstate Commerce Commission and its reparations orders.

The Interstate Commerce Commission was given juristion to decide reparations and claims, which are essential judicial matters in so far as their determination is concerned; it determines whether or not a certain carrier has violated the rules of law, but jurisdiction was vested in the Commission for the reason that it was desirable that the Commission might inquire as to the practices of uniformity throughout the country, and might accord that uni-
358 formity of rate for the purpose for which it was primarily instituted and, by analogy, it presented the argument that the functions of the Adjustment Board were administrative functions because it had, and it necessarily had and was intended to have in the back of its mind this administrative purpose.

We have not contended and we do not now contend that it is the power of this Board or that it is its function to simply disregard agreements made by the parties and to throw them aside and to formulate new agreements in their place.

We do not intimate in any sense that such is the function of the Board.

Now, I said that the plaintiff insists that that is exactly what the Board has done in this case, but as your Honor well knows, it is customary for any litigant coming into Court with that interpretation placed upon an agreement by a tribunal passing upon the matter previously, to come into Court and say, "here, the tribunal whose decision we are attempting to have reviewed has read into this agreement something which is not there, and has created a new contract for the parties," which is equivalent to saying that the lower tribunal has committed an error of law, and that is exactly the proposition that is being advanced
359 here as far as the plaintiff's individual case is concerned; it asserts that an error of law has been committed by the Adjustment Board and that it has read into the contract something that was not properly there, and that is far as the argument properly goes.

Now, it is contended by plaintiff that this is not a proceeding for review. The basis for that argument is this: that the plaintiff's proceeding is on its contract; that it seeks an interpretation of its contract rights.

Reduced to its lowest elements, that argument simply means, if it is true, that no proceeding is the proceeding for review, in the ordinary sense, and an interpretation of its substantive rights. That is obviously fallacious.

Any proceeding for review that does not involve merely procedural issues is based fundamentally on the contention of the plaintiff that his substantive rights have been violated.

Now, he has gone to one tribunal; that tribunal says, "You are wrong;" he appeals his case to a second tribunal, but presents the same case—argument and contentions he is still basing his case on the contract, but that proceeding is appealed; that proceeding is for review. The proceeding is determined to be one for review, or a proceeding
360 de novo, not because of the rights which are asserted in the proceeding, because they might be the same, but because of the effect which the review proceedings is destined to have upon the decision of the tribunal; that is, the tribunal passing on the case. I call your Honor's attention to pages 12 and 13 of the complaint, where it says:

"Praying relief of this Court and further declaring that said award No. 3115, Docket No. 5059 and Order of the National Railroad Adjustment Board, First Division, entered therein, did not lawfully confer any right upon the defendants to perform the work of making such movements, and that said award and order insofar as they purport to confer any such right are invalid and of no legal force and effect."

Mr. Dickinson: If the Court please, as is sometimes the case when a pleading is prepared, the case is not as fully stated as it might be afterwards, as far as we are concerned, we do not regard such particular part of the prayer as of any importance, and are perfectly willing to strike here now. We attach no importance to it whatever and do not regard it as a part of our case.

Mr. McEwen: Suppose we leave out of consideration the language which plaintiff's earlier conception of the case inserted in the pleadings, is there any question that
361 this is exactly the effect, whether the plaintiff says it or not, this is exactly the effect which this proceeding is designed to have, in other words, let us examine it for just a moment, in as much as plaintiff, apparently, desires to abandon it—"that the order of the Board entered therein did not lawfully confer any right upon the defendants to perform the work of making such movements."

All right; suppose that is out of the complaint entirely; then, is it the position of the petitioner that they desire no declaration as to the award, and is the award to stand regardless of this action as conferring rights upon the defendants to "perform the work of making such movements," and is the award and order to stand so far as the - - -

Mr. Dickinson: (Interposing) I do not mean to interrupt.

Mr. McEwen: Pardon, me, until I finish my sentence. I believe you have already occupied more than your allotted period of time.

Mr. Dickinson: It was my understanding that you made the claim in your brief that the award does not confer any rights, and that seems to be inconsistent with the argument you are making now, and I don't understand it.

Mr. McEwen: May it please the Court, if I may continue—is the position of the plaintiff, then, that this

362 paragraph is to be taken out of their complaint; that the award and order are to be effective to confer such rights; is the order and award valid, or is it of some legal force and effect?

What, exactly, is the contention of the plaintiff as to this award? When this proceeding is over with, your Honor, what will happen to that award? Will it be effective, or where will it be, or what will be its legal standing?

May the defendants still come into Court under section 3 (p) of the Railway Labor Act and institute a proceeding to enforce it? Is it still valid in such a proceeding as to have these findings of fact given prima facie effect by a review in Court? Is it still effective to give the defendants a right to attorney's fees, court costs, and various and other sundry rights given them under section 3 (p)?

If this proceeding has any effect at all, this proceeding in which we are now engaged, the necessary and absolute legal effect must be to invalidate and wipe out the award of the Board, and if that is its purpose, whether stated in the complaint or not, if that is its purpose, then it must necessarily be a proceeding for review.

Plaintiff has advanced still further pronouncements to this effect: that proceedings under section 3 (p) are

363 not proceedings for review - - -

Mr. Dickinson: (Interposting) That is not what I said.

Mr. McEwen: Please, Mr. Dickinson—but are merely proceedings designed to interpret the contract. If so, the language of the statute is peculiarly phrased, for the section in question concludes as follows:

"The District Courts are empowered, under the rules of the Court governing actions of law, to make such order and enter such judgment, by writ of mandamus or otherwise as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Now, in this connection, a large portion of plaintiff argument was based upon quotations taken from the defendant's memorandum filed with your Honor.

I assume, of course, that in the examination of that memorandum, those isolated sentences and phrases which have been quoted here in oral argument, will naturally take their normal places in the course of development of the argu-

ment, and will assume the significance that we intended to give them in view of the facts, but I do wish to call your Honor's attention to one particularly glaring example of bold misinterpretation of the defendants argument.

These sentences are read from page 9 of our
364 brief:

"In other words, the procedure established by the Act, is not a procedure for review."

Mr. Dickinson: I agree I misread that.

Mr. McEwen: It is on that page, and, obviously, it refers to the Declaratory Judgments Act, and not to the Railway Labor Act.

Mr. Dickinson: I agree I misread that.

The Court: What have you to say in a case where the decision of the Adjustment Board is in favor of the plaintiff's railroad and against the employees? How is the plaintiff's railroad going to enforce that award of the Adjustment Board against the employees?

Mr. McEwen: The plaintiff railroad will enforce the award in the same way that it encorced the original contract, for the award has simply said that the employees have no claim.

Now, prior to the award, the railroad applied the agreement to suit itself, according to its own interpretation; subsequently to the award it will continue to do the same; if the employees don't like it, the only recourse that they might have would be to leave their employment.

The Court: But you do not contend that they have
365 no right to come into Court?

Mr. McEwen: No, sir.

The Court: For a declaratory judgment injunction?

Mr. McEwen: It has. The only case that is applicable to that situation, your Honor, is one I have—I believe I can find it if you will grant me just a moment.

The Court: Yes.

Mr. McEwen: It is cited on page 42 of our original brief —in a case where the Court held that a shipper invoking the jurisdiction of the Interstate Commerce Commission to pass upon his reparations claims is finally considered by an adverse action of the Commission and cannot thereafter resort to the Courts; we have already called to the Court's attention the fact that the provisions for the enforcement

and review of the orders of the Adjustment Board are the same as provided for reparation orders for the Interstate Commerce Commission, and I believe that is sound because, after all, in going to the Adjustment Board the employees are invoking the administrative process set up by statute; 99.1 per cent—it may be 100 per cent—of those cases—are presented to the Adjustment Board by the employees.

Mr. Dickinson: We don't take cases there.

366 Mr. McEwen: The reason, of course, why the employer does not take cases there is because the employer has no reason to seek the protection of the Board for the application of contract rights, as it interprets them, because it is already applying them according to its interpretation.

The Court: But it is a matter of law and of right under the statute—an employer may seek the protection of the Board?

Mr. McEwen: Oh, yes.

The Court: I supposed they did. When that question comes up and the decision is in favor of the employer railroad and against the employee, what right has the employer railroad to enforce the award that is made?

Mr. McEwen: I see your Honor's question. We will assume, in the first place, that the carrier presents a case to the Board.

The Court: They both submit it.

Mr. McEwen: They do, to this extent—

The Court: (Interposing) Do you think it makes this right any less if it is presented initially by the railroad?

Mr. McEwen: No. A petitioner before the Board is given the right to enforce the action of the Board; if the

367 carrier is the petitioner, I see no reason why the carrier would not have a right under section 3 (p) to file an action for enforcement if the award is made for the carrier's benefit. I see no reason why it may not do so under those circumstances.

The Court: I don't think it is under section 3 (p).

Mr. McEwen: I think so, your Honor.

The Court: It says, "if the carrier does not comply with the law".

Mr. McEwen: That is right, perhaps I misread that.

The Court: That is all right.

Mr. McEwen: I had not given that consideration.

The Court: I want to get back again to the question of what may be done or what can be done where an award has been made in favor of the railroad, whether the railroad applied to the Adjustment Board or whether the employee, in the first instance, filed it—it makes no difference—but the decision and the award is in favor of the railroad; in other words, in this case, suppose the decision had been that the engineers and firemen who had carried the trains over the road had the right to shift those cars in and around the yards, and the employees there—the local firemen and engineers, or whatever you call them started doing the work—what is the situation?

368 Mr. McEwen: I suppose the answer to that is, your Honor, that if they don't like it they can quit. The operating practices are in charge of the employer; if the employees fail to operate according to the practices of the employer which have been established, and in violation of the award of the Board, they are subject to discharge.

The Court: Then, in other words, that gives the carrier his complete remedy, because he can just do what the award in his favor requires him to do, and the employees may continue in the employment or not as they see fit?

Mr. McEwen: Yes.

The Court: So that your contention is that that gives the carrier a complete remedy when the award is in his favor?

Mr. McEwen: Yes, sir.

The Court: Whereas, when the award is in favor of the employee, unless you have this section 3 (p), you claim that the employee would have no sufficient remedy?

Mr. McEwen: That is correct.

The Court: To enforce the award against the carrier?

Mr. McEwen: Yes, sir.

369 The Court: Now, that seems to be cleared up in regard to both sides. What about this Act being compulsory or not?

Mr. McEwen: You mean the question—

The Court: (Interposing) As regards filing a submission?

Mr. McEwen: Well, that is a question, your Honor, to which we have given particular attention in view of the argument in this case; unless the question here is a matter

of jurisdiction of the Court under the Declaratory Judgments Act,—but if your Honor wishes, I will endeavor to give my tentative ideas on it as accurately as I can.

The Court: That might possibly be involved in this question of the rights of the parties under the contractual relationship, and any views under their contractual relationship or power or jurisdiction that is given to this Board—and then the question of the rights of the public in contracts and relationships between public carriers and their employees. Now, what is your idea in regard to the compulsion or lack of compulsion in this proceeding for an adjustment?

Mr. McEwen: I think I understand your Honor's question. In the first place, neither party is compelled to resort to that procedure, that much is clear.

The Court: By agreement of both parties?

370 Mr. Prince: I would like to call your Honor's attention to the sharp distinction drawn in the rules, at page 20, about voluntary submission where the parties join in submitting the proceeding and an ex parte submission where the carrier refuses to come in and is summoned by the Court. This case is such a case as that.

The Court: I understand this case and, in this case, the employees filed a submission, as they call it.

Mr. McEwen: Yes.

The Court: And then the employer was free to ignore it, or could he be compelled by the Board, anyway, to come in?

Mr. Dickinson: A decision could have been made; the award could have been made by default.

The Court: I know; I say they could ignore it and let it go by default; even so, the defendants would insist upon the plaintiff making out his case, so your idea is that, aside from voluntary submission by the two parties, either party may voluntarily go in and file a submission, and that then the other party is required to file a submission or the employee would get a pro confesso judgment by default—is that right?

Mr. McEwen: I don't know that that would be

371 necessarily a decree by default.

The Court: I don't mean by default, I mean the substance of it.

Mr. McEwen: In general, I think that is correct.

The Court: All right, So even where there is notice to the parties, either party may go in, and, in that way, in effect, force the other party in—is that it?

Mr. McEwen: I think so.

The Court: So while you might say there is no compulsion, really there is; that is, this Board has been set up and either party can apply to it and the other party must come in.

Mr. McEwen: There is a case that is analagous to this; a case I had occasion to check—the decision—the name of the case has escaped me but, of course, its citation is there; it was a case in the Supreme Court of the United States dealing with arbitration proceedings provided for by the State law of the State of Massachusetts—I believe I am correct in that regard—in connection with claims of insured individuals under fire insurance policies.

There is a provision requiring the parties to agree as a prerequisite to their doing business in the State of Massa-
372 chusetts, that they would submit the amount of loss to a Board of arbitrators selected by the parties themselves, and the question arose there as to the constitutionality of the Act, as to whether or not an Act was constitutional—I could secure the quotation if your Honor is interested in going further into the character of that kind of policy.

Mr. Dickinson: The Union Insurance Company did not have to go into Massachusetts to do business if it did not want to.

Mr. McEwen: That is right. I also call your Honor's attention to the section in the Act—if you will excuse me just a minute—here we are: Section 2, paragraph eighth: "Every carrier shall notify its employees by printed notice in such form and posted at such times and places as shall be specified by the Mediation Board, and that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and any such notices thereof shall be printed verbatim in large type"—the rest of it is not material.

I don't know whether this carrier posted such a notice or not; I presume it did, if it did so, using Mr. Dickinson's argument as a prerequisite to its functioning in the legal

conduct of business, and having done so, having agreed to settle the disputes as provided by this Act, it would
373 necessarily be bound—that would be my interpretation of that provision.

Mr. Dickinson: You mean compulsory arbitration?

Mr. McEwen: "Them are harsh words, Mr. Dickinson."

Mr. Dickinson: I know they are. You don't mean to imply that the employees cannot strike against an award of the Board?

Mr. McEwen: Of course, whether the employees might or might not strike, the question is, would such a strike be legal?—Would it not? They can strike, of course, or an employee can quit his work at any time that he sees fit whether or not such a strike might be called.

Mr. Dickinson: You mean there would be no protection—there would be no protection of any kind to—

Mr. McEwen: (Interposing) How do you mean?

Mr. Dickinson: (Continuing) To the employees if they went on strike; they could not picket; could not do any of those things?

Mr. McEwen: I say, that would be subject to whether or not they have violated any rule of law; if so, the carrier would of course have its opportunity to come in to a Court of Equity and set up those violations if they existed; it would be subject, then, to establishing the facts of
374 the case.

The Court: I think we had better keep down to the record because we have enough trouble as it is, when we get to preparing judgment to consider such possible constructions; it is putting too much of a burden on the Court.

Mr. Dickinson: This is a beautiful example of an attempt to have one's cake and eat it too.

Mr. McEwen: Not at all. I feel that we have already sufficiently imposed upon your Honor's time in listening to us, and I certainly thank you for the careful attention you have given.

Mr. Dickinson: There is just one thought I would like to leave in the mind of the Court and that is, as I said at the beginning, so I say at the end: with all this talk about judicial tribunals, and quasi-judicial tribunals, and arbitrary tribunals, we must remember what kind of a board we are

dealing with in the case of this Adjustment Board and that, however and whenever powers have been conferred upon government officials to interfere with the rights of the parties, and to compel them to do things that the contracts do not provide for, and compel them to do something else, we are getting a great deal further when we confer that power upon a Board like this Board, with no hearings of any substantial kind, which makes no findings of any substantial nature, which proceeds in this extremely ar-
375 bitrary and summary and drumhead criminal manner.

Mr. Prince: I might answer one question that was asked; it will only take a minute. On page 43 is exhibit F of the complaint; that contains the entire submissions that were before this Board; it is on pages 43, 44, 45, 46 and 47 of the complaint.

If your Honor will turn to those pages you will see what was before this Board and you will readily see that no arbitration proceeding was submitted to those gentlemen to consider in Chicago; they did not consider whether or not it would be economical to put two engines on to handle this train instead of one, or whether or not it would be possible for that number of engines to work at the same time through the interlocking devices—none of those things was considered. Your Honor can see exactly what was submitted to this Board.

Mr. Dickinson: In other words, the question of public interest was not submited at all; it was a technical question as between the parties. The public and the public interest must be reckoned with.

Mr. McEwen: We surely don't have to submit it.

The Court: I will take the case under advisement.

376 (Whereupon, at 12:10 o'clock p. m. of the same day, May 16, 1939, hearing in the above-entitled matter on the motion to dismiss was concluded.)

377 *Order Dismissing Complaint.*

Filed June 5 1939

* * *

Upon consideration of the Complaint filed herein, the answer of defendants as set forth in the first and second defenses, the briefs filed by the respective parties, and the Court considering said first and second defenses in the nature of a motion to dismiss, and the matter having been argued in open Court by counsel for the respective parties, it is, by the Court, this 5th day of June, 1939:

Ordered and Adjudged, that defendant's first and second defenses be, and the same are hereby sustained, and said complaint be, and the same is hereby dismissed, with costs against the plaintiff.

DANIEL W. O'DONOGHUE
Justice.

Notice of Appeal

Filed June 6 1939

* * *

Notice is hereby given this 6th day of June 1939, that The Washington Terminal Company, plaintiff-appellant, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of June, 1939, in favor of defendants-appellees, F. E. Boswell, et al, against said Washington Terminal Company.

SYDNEY R. PRINCE JR.
Attorney for The Washington Terminal Company, Plaintiff-Appellant.

Memorandum

June 6 1939

Cost bond ($250) on appeal—filed.

Date			Proceedings	
1938	Dec.	29	Deposit for costs by—Prince:	
"	"	"	Complaint and Exhs (6)	filed
"	"	30	Summons & Copies (54) Complaint issued	
1939	Jan.	24	Summons ret'd "Served as to certain defts & not fd as to others" (See file)	
"	"	26	Stipulation extending time to plead to 2/15/39, appearance Willis for defts.	
"	"	31	Sum. & copy issued as to deft. No. 22—Served 2/7/39	
"	Feb.	15	Ans. of defts. to compt	filed
"	"	21	Mo. of plff. to call up defenses for hearing. Notice, P. & A.	
"	Mar.	2	Order for preliminary hearing of defenses, Bailey, J. (consent)	
"	"	20	Memo Brief of Defendants.	filed
"	"	24	Stipulation	
"	Apr.	11	P. & A. of plff. in opp. to memo. of defts.	
"	May	11	P. & A. of deft. in opp. to P. & A. of plff.	
"	"	24	Transcript of argument of 1st & 2d defenses before Court	
"	"	"	Oral decision of O'Donoghue, J. for defts on 1st & 2nd defenses.	
"	June	5	Order dismissing complaint, O'Donoghue, J. (Notices 2 mailed).	
"	"	6	Notice of Appeal—Copy mailed William E. Willis	filed
"	"	"	Clerks costs on appeal by Prince	
"	"	"	Cost bond ($250) on appeal with American Surety Company of N Y as surety	filed
"	"	10	Designation of Record	"
"	"	"	Transcript of Argument (Volumes 1 & 2)	filed
"	"	"	Stipulation in re-transcript of Record	filed

379 *Designation of Record*

Filed June 10 1939

* * *

Now comes the plaintiff Washington Terminal Company, appellant, and designates for inclusion in the transcript the complete record and proceedings and evidence in the action, namely:

1. Bill of complaint with exhibits
2. Answer of defendants consisting of First, Second, and Third Defenses
3. Order assigning First and Second Defenses for advance hearing
4. "Memorandum Brief of Defendants", filed circa March 20, 1939
5. Brief entitled, "Plaintiff's Memorandum of Points and Authorities
6. Brief entitled, "Defendants' Memorandum of Points and Authorities, etc", filed circa May 10, 1939
7. Transcript of argument of May 15th and 16th, filed May 24, 1939
8. Order Dismissing Complaint, dated June 5, 1939
9. Docket entries
10. Notice of Appeal, filed June 6, 1939
11. This designation

JOHN DICKINSON
SYDNEY R. PRINCE JR.
Attorneys for The Washington Terminal Company.

We concur in the foregoing designation of record this 9th day of June, 1939, on defendants' behalf

FRANK L. MULHOLLAND
WILLIAM E. WILLIS
Attorneys for Defendants.

380 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify

the foregoing pages numbered from 1 to 379, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 1165, Civil Action, wherein The Washington Terminal Company is Plaintiff and F. E. Boswell, et al., are defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of June, 1939.

C. E. STEWART,

(Seal) *Clerk.*

Endorsed on cover: No. 7465. The Washington Terminal Company, Appellant, vs. F. E. Boswell et al. United States Court of Appeals for the District of Columbia Filed Jul 8-1939 Joseph W. Stewart, Clerk.

[fol. 330] Thursday, April 18th, A. D. 1940.

No. 7465

THE WASHINGTON TERMINAL COMPANY, Appellant,

vs.

F. E. BOSWELL, E. R. BURKHEAD, R. B. BRIDGES, et al.

The Honorable John Dickinson of Philadelphia, Pennsylvania, member of the Bar of the Supreme Court of Pennsylvania and of the Bar of the United States Supreme Court, was introduced to the Court by Mr. Henry L. Walker and the Court recognized him for the purposes of this case.

The argument in the above entitled cause was commenced by Mr. John Dickinson, attorney for appellant, continued by Mr. Frank L. Mulholland, attorney for appellees, and concluded by Mr. John Dickinson, attorney for appellant.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7465

THE WASHINGTON TERMINAL COMPANY, APPELLANT,

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Decided November 18, 1941

Mr. John Dickinson, with whom *Messrs. Sydney R. Prince, Jr.*, and *Henry L. Walker* were on the brief, for appellants.

Mr. Frank L. Mulholland, with whom *Messrs. Willard H. McEwen* and *William E. Willis* were on the brief, for appellees.

Before STEPHENS, MILLER and RUTLEDGE, JJ.

RUTLEDGE, J. The Declaratory Judgments Act, 48 Stat. 955, was enacted June 14, 1934.[1] One week later the Railway Labor Act (Act of June 21, 1934, 48 Stat. 1185) was passed. The latter established the National Railway Adjustment Board for settlement of disputes arising under collective agreements between the carriers and their employees. The Board's awards are not enforceable by it. But awards in favor of employees may be enforced by suit in the District Courts begun within two years from accrual of the causes of action under them. 45 U. S. C. § 153 First (p), (q).

In such a suit the Act gives the employee definite and substantial advantages. [*Id.* (p)] It does not expressly make the enforcement suit exclusive of others to determine rights arising under collective agreements. The question in this case is whether it has done so impliedly, as to a carrier and employees who have utilized the adjustment procedure and procured an award. Stated otherwise, the issue is whether a carrier, which has been unsuccessful before the Board, can maintain a suit for a declaratory judgment of rights under the original collective agreement during the two years which the Act allows for the employees' enforcement suit. We think the answer should be negative, and therefore the District Court was right in dismissing the complaint of the carrier, appellant here.

The decision in *Moore* v. *Illinois Central R. R.*, 312 U. S. 630 (1941), rendered since this case was argued, has put beside the point much of the argument here. The case held that the Railway Labor Act does not preclude an employee from bringing a suit for damages for alleged wrongful discharge contrary to a collective agreement. The plaintiff employee, however, had begun his suit before the administrative machinery had been set in motion. The decision establishes

[1] The Act was amended by Act of August 30, 1935, 49 STAT. 1027.

that in such circumstances the Act has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial, without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms.

But the *Moore* case neither presented nor decided the question whether, when one party has put the adjustment procedure in operation, the other may disregard it entirely and at any subsequent stage have a judicial determination of the issues other than that provided by the Act. From the fact that either party may go directly into court in the beginning for relief independent of the statute, it does not follow that he or the other may short-circuit the administrative proceeding while it is in progress or the statutory enforcement suit during the two years allowed for bringing it.[2] That is true, whether the matter be regarded as involving the existence of jurisdiction in the courts independently of the Act or merely sound judicial discretion in its exercise.

In this case the dispute arose under a collective agreement made February 1, 1923, between the plaintiff carrier and two labor unions,[3] which represented the employees who are the defendants. The agreement fixed seniority rights and other terms of employment of enginemen and firemen. In 1934 defendants asserted they were entitled under the agreement to perform certain work which others previously had done. This consisted chiefly in moving empty passenger cars from the storage yard to the Union Terminal Passenger Station in Washington, D. C., and *vice versa*, preceding and following, respectively, the departure and arrival of trains on interstation runs. The regular train crews had done and still do this work. They are employees of the railroads—called the tenant lines—which use the station's terminal facilities.

Plaintiff rejected defendants' claim. Thereafter they invited it to make a joint submission of the dispute to the Board. Plaintiff declined. But, as the Act entitled them to do,[4] defendants submitted it. Plaintiff thereupon apeared in the proceedings and made full submission on the merits in accordance with the statutory provisions.[5]

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[2] The facts do not require us to be concerned with the question whether suit independent of the statute could be instituted by either party after the expiration of the two-year period. But *cf. infra* this opinion.

[3] The Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen.

[4] Section 3 First (i) [45 U. S. C. § 153 First (i)] requires private negotiation up to the carrier's chief operating officer for handling disputes, and provides: "but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board...."

[5] Although plaintiff declined to make a joint submission, when defendants submitted the dispute plaintiff made no objection to the Board's jurisdiction but appeared and participated in the proceedings throughout without questioning the Board's power to make an award. It need not be decided whether plaintiff might have refrained from appearing or participating. It elected to do so, and thus had the full benefit of the proceeding. If the proceeding had been a suit in court, the appearance would have been a general one.

The Board, acting by its First Division, deadlocked. A referee was appointed as the Act requires in such an event and, with his participation, the Board's award was made October 24, 1938. It held that the contract entitled the employees to perform the work in question. The same day the Board ordered the employer to make the award effective within thirty days. Plaintiff has not complied. Instead, on December 29, 1938, it filed this suit. It was begun, therefore, slightly more than one month from the day on which the employees' cause of action arose on the award, although the Act gave them two years to sue upon it and made no provision for an employer's suit to set it aside or restrain its enforcement.[6]

I.

The suit asks for an adjudication of rights under the original contract. It seeks also a declaration that the Board's award and order are void. Whether or not the issues in suit and those of the administrative proceeding are identical in all respects,[7] they are so to the extent that each involves the question whether the collective agreement, rightly interpreted, gives the employee defendants the right to do the work in dispute. That is the fundamental issue presented in both. The effect, therefore, of a declaratory judgment favorable to plaintiff would be to nullify the award. Consequently this suit is essentially one to review it. Whether the judgment were in plaintiff's favor or otherwise, allowing the suit to be maintained would deprive the employees of the special advantages which the Act confers upon them in the enforcement suit.

We do not think that Congress intended the Board's awards to be reviewable in this manner. The Railway Labor Act makes no provision for review as such. But it does set forth a definite and special scheme for securing judicial determination that the award is or is not in accordance with the legal rights of the parties. If the scheme is adequate constitutionally, as we think it is, we do not believe Congress intended that it should be circumvented by free resort to other forms of judicial review or determination *de novo* of the merits of the controversy.

If Congress had made no provision for judicial review, in the broad sense we have indicated, the general applicability of the Declaratory Judgments Act, adopted almost simultaneously, might be regarded as supplying the omission. But the matter was not an omitted one. This is shown conclusively by the presence in the Railway Labor Act of the detailed plan for review. It is shown further by the character of the plan's details. We think these things show, too, that the method of review provided was intended to be exclusive. If Congress had intended the Declaratory Judgments Act to be generally

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[6] The facts have been stated only in essential outline. A more detailed statement appears in the able dissenting opinion, to which reference is made in the interest of economy of space.

[7] Under Section 3 First (p) [45 U. S. C. § 153 First (p)] the employee's petition in the enforcement suit must set forth "the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises." He is not limited to matters stated in the award, nor is the carrier in its defenses. But those matters necessarily are in issue, and generally they are the only ones when the dispute, the administrative proceeding and the award involve interpretation and application of agreement. The suit is *de novo*, not merely one for review proper.

available to the parties, regardless of the fact that an award had been made and of its terms, there could have been no substantial reason for including in the Railway Labor Act the complex and detailed provisions for the enforcement suit or, for that matter, any special method of review. More especially, there could have been no such reason for writing into the statute the unusual and highly important special advantages given to the employee seeking enforcement.

Congress intended these advantages to mean something. They mean nothing if such a suit as this can be maintained. They are very substantial advantages. They are conferred by Section 3 First (p) of the Act [45 U. S. C. § 153 First (p)], which is set out in full below.[8] Their purpose and effect, as will be seen, is to equalize the burden, financial and otherwise, of extended litigation as between employees and the carriers. The Act contemplates suits by individual employees as well as by labor unions. It recognizes the unequal financial position of the litigants when a railway laborer pits his strength against his employer's in court. Whatever may be true of unions, individual employees do not maintain corporate legal departments, sustained by revenues derived from the public. They cannot charge off attorneys' fees to business expense. Often their own resources would be inadequate to secure competent counsel. The relief sought often does not include recovery of money, so that a contingent fee payable only from the proceeds of recovery or the employee's resources frequently would not be attractive. Congress recognized this inequality and undertook to reduce it. Hence, the Act provides for recovery of an attorney's fee, if the employee is successful in the suit. [45 U. S. C. § 153 First (p)] Costs of litigation alone are prohibitive, particularly to laboring people suing as individuals. Hence the petitioner in an enforcement suit is exempted from their payment, except those that accrue upon his appeal. Situs of litigation may be highly important, also as a matter of expense, to the complaining employee. Hence he may sue where he resides or where the carrier's principal operating office is located. Choice of venue in litigation which is unequal because of the financial advantage of the other party may mean the difference between asserting one's rights in court and foregoing them altogether. All these advantages, choice of venue, exemption from payment of costs, and recovery of attorney's fees if successful, are intended to

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[8] "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, or as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

make less unequal than in ordinary or general litigation the contest between employee and carrier over work and the terms on which it is done. The latter is equipped for litigation, to the last resort. The former is not. In equalizing the struggle somewhat, Congress has recognized that justice too often is blind to financial inequality between the parties in litigation, especially when they are employer and employee, and has determined that it shall not be entirely so in these disputes.

The statute also relieves the employee of another burden. It provides that the enforcement suit "shall proceed in all respects as other civil suits, except that on the trial . . . the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated." [45 U. S. C. § 153 First (p)] The burden of proof, in making a prima facie case, may be financial as well as procedural, and it may be heavy. The statute relieves the employee of this, at least to some extent, when he introduces the findings and order in evidence. Though they may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike.[9] That does not make their findings and decisions less probative; rather it should make them more so. They know the language,[10] functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony.

All these advantages the statute makes incident to the enforcement suit. They cannot be had in any other. We have no power to grant them in this one. Yet the argument that it can be maintained brushes them aside, as if they were mere matters of procedure, not affecting the substance of decision or right. With that we cannot agree. In many cases their absence would mean the denial of decision and of right. In others the burden of securing these would be increased. When Congress created the advantages, we think it intended they should be available in all suits essentially for review of the Board's awards, at any rate during the two years allowed for bring-

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[9] As will be shown, *infra*, the Act appears designed to reduce resort to the courts for determination of these controversies to a minimum, consistent with adequate constitutional protection for the rights of the disputants.

[10] An instance of railroad vocabulary is cited in Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency* (1937), 46 YALE L. J. 567, 569, note 10: "The following bulletin was issued by a superintendent of the Southern Pacific Ry. in San Jose, Cal., on Dec. 20, 1928: 'All Yardmasters: Effective date, all yardmen in cannon-ball service bringing drags in yard from outside points will bleed and cut own cars.'"

ing enforcement suits. We do not believe it meant to set up a race of diligence between employer and employees to see which could beat the other into court after an award is made. The terms of the Act, particularly Section 3 First (p), clearly negative such an idea. Yet that will be the inevitable result of allowing other than enforcement suits during the period of limitations. Congress had no purpose to give the statutory advantages to the employee if he should beat his employer to the courthouse, but to take them away if he should come in second. That is true whether the employer's suit is one to restrain enforcement of the award, set it aside, declare it void, or reinterpret the original contract with the same effects upon the award. If a carrier can have full advantage of the administrative proceeding,[11] on the chance it will be successful, yet when the event is otherwise relieve itself of all its disadvantages, circumventing the employee's rights by judicial proceedings in which they are not available, the Railway Labor Act will have become, finally, a dead letter. The Board's awards would amount to nothing more than innocuous advice to the disputants, like that provided for under the Railway Labor Act of 1920 [41 Stat. 470 (1920), 45 U. S. C. § 144 (1934)], or mere proposals for a new agreement, having not even the force of an offer in the law of contracts. If that is the result of the Act and of an award, Congress went to much ado about nothing. The chief effect of the legislation would be to create much complicated machinery, capable of producing only delay and confusion in settlement of disputes which it was the avowed object of the Act to end with expeditious decision. We do not believe that Congress intended any such consequences.

As against these views, the extreme argument is made that Congress did intend the Act to provide nothing more, prior to institution of suit to enforce an award, than an elaborate and complicated method of private, voluntary negotiation. In this conception the Board becomes a mere private go-between, without arbitral or quasi-judicial powers, not a public institution. The argument ignores the language, purposes and effects of the statute, both in its administrative provisions and in those for judicial enforcement of awards. It disregards, too, the basic, progressive, and integral structure of the statute.

The entire statutory process has three distinct and primary stages: (1) direct negotiation between the disputants; (2) administrative determination; (3) judicial enforcement.[12] While these are distinct, they are not independent. Each is related to the others as links in a chain or successive steps in a stairway leading to decision. The first

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[11] According to statistics available in 1938, approximately one-third of the Board's awards were in favor of the carrier. Of a total of 3,134 decisions rendered, petitions were sustained in 1,745 cases, denied in 888, sustained in part in 394, and dismissed or remanded in 107. SPENCER, THE NATIONAL RAILROAD ADJUSTMENT BOARD (1938) 50. Since the Act makes no provision for suit by the employee to set aside or review unfavorable awards, it is at least doubtful whether such a remedy exists. *Cf. infra* this opinion. If none exists, the carrier has the advantage, when successful before the Board, of a conclusive determination. If, on the contrary, the employee may have review independently of the statute, it would be without benefit of the statutory advantages.

[12] The negotiating phase is covered by Sections 2 (First to Tenth), 3 First (i) [48 STAT. 1186, 1191, 45 U. S. C. §§ 152, 153 First (i) (1934)]; that of administrative determination by Sections 3 First (a-o) [48 STAT. 1189-92, 45 U. S. C. §§ 153 First (a-o) (1934)]; and that of judicial enforcement by Sections 3 First (p), (q) [48 STAT. 1192, 45 U. S. C. §§ 153 First (p), (q) (1934)].

stage is private and voluntary. The second is voluntary, though in our view not private. The third is public and we think exclusive, though not compulsory.[13] Despite these differences, each stage has special relation to and effects upon the other.

The language of the Act regarding the second phase is not that of private negotiation. Section 3 establishes the Adjustment Board and gives its first division "*jurisdiction* over disputes involving train and yard-service employees." [45 U. S. C. § 153 First (h)] The dispute is referred to the Board, after unsuccessful private negotiation, "by *petition* of the parties or *by either party.*" [*Id.* (i)] Awards must be stated in writing and "shall be *final and binding* upon both parties" except as to money awards.[14] [*Id.* (m)] When the award favors the petitioner-employee, the Board must make "an *order*, directed to the carrier, to make the award effective." [*Id.* (o)] "Jurisdiction," "petition . . . by either party," "final and binding upon both parties," "an order, directed to the carrier," these are not words of polite suggestion. They are terms of duty, if not of force. They describe power and decision, not mere advisory intermediation. That is true though the Board has no power to enforce its orders otherwise than by decision. In that respect the awards and orders may be said to constitute a kind of administrative declaratory judgment. This view is consistent, too, as the other is not, with the Act's expressly declared objects, "to avoid interruption to commerce and to provide for *prompt* and orderly settlement of *all* disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." [45 U. S. C. § 151a] (Italics in this paragraph supplied)

The enforcement provisions also show that the administrative phase is not merely advisory or simply "private negotiation." As has been shown, awards are given substantial legal effects in the enforcement phase. In addition to those mentioned previously awards favoring employees create causes of action in their favor. [45 U. S. C. § 153 First (q)] Mere private go-betweens have no such power, unless they are agents.[15] It is true that the award is not a conclusive legal determination. That is true also of any decision, administrative or judicial, which is reviewable or determinable *de novo* by the courts. But that does not mean that the decision has no legal effect or that it amounts to mere private advice. If we assume that Congress could attach to the advisory action of mere private intermediaries the consequences which it has given to awards favoring employees, their character is such as to make improbable its intention to do so. That it has done so indicates rather that it regarded the Board as a public agency per-

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[13] The Act permits, but does not require, the employee to bring an enforcement suit. Section 3 First (p).

[14] This provision is qualified by the absence of provision for enforcement by the Board and by the provision of Section 3 First (p) that the findings and order shall be prima facie evidence of the facts stated, in the enforcement suit. *Cf.* note 36 *infra*.

[15] The Board is bi-partisan [45 U. S. C. § 153 First (a)], as are its divisions [*Id.* (h)], and the members are paid by the parties who select them. But awards can be made only by a majority, and when the members deadlock a referee participates to break it. There is, of course, something of partisan representation, but it is not that of private agency. The Board and its divisions act in their official capacities when making awards. *Cf.* FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 185, 186.

forming public functions. There would have been no point in resorting to Congress to establish the Board and define its jurisdiction and powers if it had been intended to be a merely private agency and its functions merely advisory. That could have been done by private arrangements. And experience with the 1920 Act demonstrated that such procedures were a failure.

The view that the Board is a public agency doing public work derives support also from the long legislative history of the Railway Labor Acts.[16]

But it is said the decision in *Moore* v. *Illinois Central R. R.*, *supra*, and language of the opinion, establish that Congress intended the Board to be a private agency and its awards to have private, advisory character. This conclusion is drawn because, according to the opinion, the Railway Labor Acts have not been "based upon a philosophy of compulsion," but were intended to create "a system for peaceful adjustment and mediation voluntary in its nature."[17]

The argument confuses private quality with voluntary character. It also ignores the always present limitation upon judicial language imposed by the facts concerning which it is used. It is one thing to hold that Congress intended an administrative remedy to be voluntary in nature, not based upon a philosophy of legal compulsion. It is another, and entirely different one, to hold that it intended the remedy to be legally ineffective when resorted to voluntarily by the disputants. Keeping open the usual channels of judicial relief before the administrative procedure has been set in motion is entirely consistent with and fully satisfies the statutory scheme's voluntary character and absence of compulsion. Choice has its play for or against it. But when choice has been exercised and the statutory methods have been employed, it does not follow, from the statute or the *Moore* case, that Congress intended their consequences, declared by itself, to be wholly ignored by the parties or the courts as they might be if they were mere private advice or suggestion. The *Moore* decision holds that Congress has not compelled disputants to go before the Board. It does not hold that, having gone, they can disregard the award and its consequences at will. That would be too much to imply from the decision or the Court's language. That language has full meaning when applied to the facts of that case. In our view it is perverted when fitted to the facts of this one.

We think, therefore, that Congress intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice. It intended the employees, when successful before the Board, to have definite and substantial probative and financial advantages in suits to enforce awards, which they cannot have in other suits. Because this is so, and because the Act gave the employees two years in which to sue for enforcement, we think Congress intended the courts during that period to keep hands off these controversies except in the manner specified in the Act. This would be true if it were necessary to regard the issue now presented as involving the existence of jurisdiction to enter-

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16 For this see SPENCER, THE NATIONAL RAILROAD ADJUSTMENT BOARD (1938); Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency* (1937) 46 YALE L. J. 567.

17 312 U. S. at 635, 636.

tain other forms of suit. It is equally true, when the issue is considered as presenting a question of sound judicial discretion in declining to exert jurisdiction, more especially since this is a suit for a declaratory judgment. To permit maintenance of this suit would short-circuit both the administrative proceeding and the special statutory suit. It would make the Railway Labor Act a dead letter so far as legal effect is concerned, perhaps also as a "voluntary, private system of negotiation."[18] So far as the intention of Congress goes, therefore, we cannot believe these results were contemplated.

II.

It remains to consider the constitutional questions. They are closely related to those concerning Congress' intent. It is argued that the Act must be construed as creating merely a private, non-obligatory system of negotiation, because otherwise considered the administrative procedure is wanting in the essentials of due process of law and the remedy afforded the employer by defense to the employee's enforcement suit is inadequate. Thus it is said that to give the Act the effect of preventing the maintenance of the present suit will deny to the carrier constitutionally guaranteed protection of its rights.

Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality. Though the effects of an award favorable to an employee are substantial, they do not conclude the employer's rights. The Board cannot enforce its awards. That is left for the courts to do. It can be done only in a suit *de novo*.[19] In the suit the cause of action is upon the award, to secure its enforcement. But the parties are not limited by its provisions in the trial. The employee must set forth "the causes for which he claims relief" and the Board's order. [45 U. S. C. § 153 First (p)] The suit must "proceed in all respects as other civil suits," except that the order and findings "shall be prima facie evidence of the facts therein stated." (*Ibid.*) The carrier is limited in no way as to its defenses or the evidence it may wish to present. Its day in court in the enforcement suit is a full one. That is hardly disputed. The short answer, therefore, to the argument that the administrative proceeding is wanting in due process is that, if so, this is entirely immaterial.[20] Any failure in this respect is cured by the full and complete opportunity which the carrier is given in the en-

[18] It is doubtful whether parties would resort to a procedure which could be discarded at any moment without some adverse legal effect. In that event, the only certain result would be delay in the final settlement.

[19] Because of its prima facie factual effect, the award may give the suit something more than the character of a normal suit *de novo*. But the suit may be classified thus more accurately than as one for review proper.

[20] *Cf.* note 32 *infra*. See also the enforcement suit provisions of the Federal Trade Commission Act, Sections 9 and 10 (38 STAT. 723), held to provide adequate, and as we construe the decisions, exclusive, remedies in Federal Trade

forcement suit to make its defense under all procedural and substantive guaranties of the Constitution.[21]

That is true, unless, as plaintiff contends, the fact that its day in court under the statute is one of defense rather than offense, or both, renders its remedy or protection inadequate. It complains that the statute balances the scales of justice unevenly by permitting the employees to sue and not giving to itself the same right.

If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might therefore have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different.

Commission v. Claire Furnace Co., 274 U. S. 160 (1927), and Federal Trade Commission v. Maynard Coal Co., 57 App. D. C. 297, 22 F. (2d) 873 (1927). In our view, the enforcement procedure prescribed by Sections 9 and 10 of the Federal Trade Commission Act is not distinguishable from that presently involved, either by the fact that in the former the suit was instituted by the Attorney General, in his discretion and at the request of the Commission, or by the fact that the orders were to file reports with it rather than *decisions* concerning contract rights and adjustment of private disputes. As to the first asserted ground of distinction, the Attorney General's discretion was a limitation upon the Commission's power to institute the enforcement suit, not a grant of power to the complainant to set it aside. Plaintiff complains here, not because defendant can institute the enforcement suit or because his power to do so is not limited by a discretion given to a public official, but because it is not given the right to sue to set aside the award. As to the second ground, it may be doubted whether persons are entitled to greater protection, in the constitutional sense, respecting contract rights and disputes concerning them than they are with respect to inquisition concerning private business affairs and possible publication of the information derived from it.

Except in respect to the initiative in litigation, analogies to the enforcement procedure presently before us may be found in the procedure prescribed by Section 4915 R. S. (35 U. S. C. § 63) for obtaining a patent, in which the issues are triable *de novo* on all the competent evidence, General Talking Pictures Corp. v. American Tri-Ergon Corp., 96 F. (2d) 800 (C. C. A. 3d, 1938), but the adverse decisions of the Patent Office, by reason of its expert technical knowledge, are entitled to great weight, Abbott v. Coe, 71 App. D. C. 195, 109 F. (2d) 449 (1939); and also in proceedings before the Board of Tax Appeals, in which the determination of facts by the Commissioner of Internal Revenue is regarded as prima facie correct. Flynn v. Commissioner of Internal Revenue, 77 F. (2d) 180 (C. C. A. 5th, 1935); Mente v. Commissioner of Internal Revenue, 76 F. (2d) 965 (C. C. A. 5th, 1935); Green's Advertising Agency v. Blair, 31 F. (2d) 96 (C. C. A. 9th, 1929); *cf.* Phillips v. Commissioner of Internal Revenue, 283 U. S. 589 (1931).

21 *Cf.* Nickey v. Mississippi, 292 U. S. 393 (1934); Pike v. Walker, App. D. C. , 121 F. (2d) 37 (1941); Montana Power Co. v. Public Service Commission, 12 F. Supp. 946 (D. Mont. 1935), *rev'd on other grounds*, 299 U. S. 167 (1936); Cook v. Des Moines Union Ry., 16 F. Supp. 810 (S. D. Iowa 1936); 16 C. J. S. 1280. See also Crowell v. Benson, 285 U. S. 22 (1932).

And in this lies a stronger answer. It is the fact that unless the employee institutes an enforcement suit, the carrier cannot be prejudiced in any legal sense by the absence of an opportunity to sue. The only purpose of such a suit would be to set aside or nullify the award. But this is not necessary for adequate protection of the carrier's rights. The award is not self-enforcing or enforceable by the Board. It is merely a decision that the carrier should change its operating practice in the manner specified. It has the power of management and if it regards the award as contrary to its rights it can maintain the existing practices. The Act confers upon the employer the powerful advantage of defensive position in respect to the award. It places the burden of enforcement upon the employee. It limits the time within which he may act. The period allowed is not unreasonable. If he does not act within it, presumably his right to do so is gone.[22] If not, he loses at any rate the special advantages of the statutory suit.

In all this there is no essential unfairness. Certainly there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If it chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit.

A further argument remains. It is that unless the carrier can maintain such a suit as this, the employees will elect not to institute enforcement suits, but to rely upon their economic bargaining power, that is, the right to strike, to secure enforcement or acceptance of awards. Thus, it is said, the carrier will be deprived of its day of defense, and so of its only day in court. It is urged that the court should look at the facts of industrial and railroad life and determine the effects of the statutory provision for suit in their light. If that is done, the further fact cannot be ignored that carriers, as well as labor unions and employees, have economic bargaining power. They are not entirely defenseless in the face of threat of strike. Nor are railroad strikes so easily and readily called and put in effect that they are everyday occurrences. Employees, as well as employers, have a stake in avoiding them.[23] And there is elaborate provision in Section 2 of the Act for meeting the contingency of a strike.

There is nothing to show that the consequence feared will follow, except the unsupported and argumentative assertion that it will and the fact that few enforcement suits have been insti-

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[22] Otherwise the limitation of Section 3 First (q) [45 U. S. C. § 153 First (q)] would be meaningless. It is not contended that the remedy afforded the employee when the award is in his favor is inadequate. It may have been the philosophy of the Act to provide a reasonable period for litigation following the award and when that has passed to make an end of the whole matter by barring the employee's asserted claims.

[23] *Cf.* SPENCER, *op. cit. supra* note 11, at 64: "It is true, of course, that the controversies over which the Board has jurisdiction are not of such a character, generally speaking, that they produce strikes and other serious consequences. At the same time an accumulation of these minor controversies which cannot be settled quickly and equitably tends to breed suspicion and distrust on the part of employees, and, of course, may result in major controversies." The major causes of strikes, *i. e.*, those involving questions of representation for collective bargaining, making of collective agreements, etc., are committed to the Mediation Board rather than the Adjustment Board, by Section 2 of the Act. *Cf.* SPENCER, *op. cit. supra*, at 30.

tuted.[24] This might mean that the carrier supinely accepts all adverse decisions of the Board, though believing them erroneous. On the other hand, it may mean that the Board has done its work well or with reasonable satisfaction to the disputants.[25] That this may be true is shown to some extent by the fact that a large percentage of its decisions have been favorable to the carrier.[26] The provisions for majority vote of the bi-partisan Board and for selection of referees in cases of deadlock go far to assure fair hearing and decision. It is entirely possible that both carriers and employees prefer acceptance of decisions so rendered to incurring the heavy expense and long delay incident ordinarily to final judicial decision in enforcement suits.[27] It is not alleged that strikes or threats of strike to secure employees' demands of this character have been more frequent than they were before the amendments of 1934 which created the National Railway Adjustment Board and its procedures.

Finally, even if the argument were more persuasive factually, it is hardly sufficient to establish the unconstitutionality of the legislation. The Railway Labor Act was designed, not to outlaw the right to strike, but merely to prevent the necessity for its exercise. That it has done, as the results attest.[28] The argument assumes that a strike, or threat of one, to secure acceptance of an award would be unlawful. That it would be so has not been established, and the question need not now be determined.[29] Whether such action would be lawful or unlawful, the mere possibility that employees may resort to it rather than to suit is not enough to make the latter inadequate constitutionally as protection for the carrier's rights. The weight of that possibility is properly within the discretion of Congress in determining whether the initiative in litigation shall be given to one party or the other, particularly where as here it has given no final or conclusive effect, as against the party put upon the defensive, to the cause of action to be asserted. The fact that one party to a dis-

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[24] So far as we have discovered, the only reported case thus far brought to enforce an award is Estes v. Union Terminal Co., 89 F. (2d) 768 (C. C. A. 5th, 1937). It is understood that other cases are now pending in the courts to secure enforcement.

[25] *Cf.* Garrison, *op. cit. supra* note 10, at 592, 593. See also FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 185-8; SPENCER, *op. cit, supra* note 11, 49 *ff.*, 63; Administrative Procedure in Government Agencies, SEN. DOC. No. 10, Part IV, 77th Cong., 1st Sess. (1941).

[26] *Cf.* note 11 *supra.*

[27] For instance, Moore v. Illinois Central R. R., 312 U. S. 630 (1941), though not an enforcement suit, illustrates the possibilities for delay in judicial disposition of these controversies. The litigation originated in the state courts of Mississippi in October, 1932, though the suit in which that decision was rendered was not begun until 1936. Since then, through nine years, it has wended its tortuous way, back and forth through state and federal courts, until it reached the Supreme Court and was decided on March 31, 1941. Now it is on its way back again for another round. This circle of litigation, reminiscent of that pointed out in the dissent in McCart v. Indianapolis Water Co., 302 U. S. 419, 423, 437 (1938), hardly comports with the promptness required by purposes of the Railway Labor Act as stated in Section 2, though it may afford a maximum of orderliness. The present litigation might be cited also to the same effect.

[28] It is not alleged that any strike has been instituted to enforce an award. In one instance a strike ballot was taken. Garrison, *op. cit. supra* note 10, at 591, note 94. See also FIRST ANNUAL REPORT OF THE NATIONAL MEDIATION BOARD (1935) 29; SECOND ANNUAL REPORT (1936) 34.

[29] Possibly the answer would depend on whether the award conforms to the employees' rights as finally determined judicially. If so, and the two should coincide, the strike would not be unlawful.

pute which is litigable may undertake to settle it illegally does not render a legal remedy, adequate within itself, inadequate.

It is urged also that the statutory suit is inadequate because, if no other remedy is available, the employer will face a dilemma, namely, to obey the award, thereby risking a suit for breach of contract by the tenant lines' road engine crews; or to disobey it, thus incurring the risk of having to pay both the road engine crews for doing the work or for not letting them do it and defendants' accumulated demands for the same work, though they will not have done it. Accordingly, plaintiff says it must build up a large fund to guard against these contingencies and should be relieved from this burden.

We are not impressed with the force of the argument as establishing either the constitutional inadequacy of the enforcement suit or (since the two come to substantially the same thing in these circumstances) the intention of Congress not to make it exclusive.

In the first place, if we assume that the dilemma is presented in the full force of plaintiff's statement, we do not agree that permitting plaintiff to maintain the present suit would give it certain escape. The contrary argument assumes that the decision on the merits would be in plaintiff's favor and would be rendered more promptly than plaintiff could secure final determination of its rights under the provisions of the Railway Labor Act. Neither assumption can be made. Of course, defendants' claims would be disposed of and the dilemma would be resolved by a decision in plaintiff's favor. But it is hardly probable that this could be accomplished in the ordinary course of litigation within the two years allowed the employee to bring his enforcement suit.[30] After that time the statutory bar against his suit would appear to make recourse to the courts by the carrier unnecessary.[31] We cannot assume that the decision on the merits would be in the employer's favor. If it were otherwise, it is true that the rights existing under the contract would be adjudicated as between the plaintiff and the defendants. But that would not be true as to any rights of the tenant lines' crews against the plaintiff. They are not parties to this suit, the collective agreement or the award. The contract or arrangement under which they do the disputed work is not in evidence or in issue. Their rights, therefore, could not be determined in this suit. *Cf. Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936). Consequently, a decision in favor of the defendants could not relieve the plaintiff from its dilemma. The tenant lines' crews could assert their claims in other litigation. It is therefore highly questionable whether permitting plaintiff to have declaratory relief would give it a more prompt and certain escape than is afforded under the Railway Labor Act. If the enforcement procedure, including the statutory bar, is inadequate for failure to afford relief from the dilemma, the declaratory judgment suit, as it is sought to be maintained here, is hardly less so. Constitutional inadequacy of one remedy is not cured by substitution of another which is equally inadequate or substantially so.

But we do not believe the dilemma is as strong as plaintiff makes it appear. The record does not show that it is under any contractual obligation to the tenant lines or their employees to have the latter perform the work. As the dissenting opinion points out, it may be inferred from statements in the pleadings and the briefs on appeal that the expense of the service done by the train crews is borne by the plaintiff. But it is not shown that this is pursuant to any con-

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[30] See 27 supra.

tract which gives them the right to do this work. It appears merely that there has been a "*practice* to keep a strict accounting between the parties of the amount and value of such services, and periodically the plaintiff is required to pay, and does pay *to the Tenant Lines*, sums equal to the reasonable value of said services." (Italics supplied) It does not appear that the tenant lines' employees have any personal claims against the plaintiff or that they or the tenant lines themselves have any contractual right to do or continue doing this work. The largest permissible inference is that the tenant lines have a right, under the practice which has been followed, to be reimbursed by plaintiff for the value of the services actually rendered by their employees. On the record before us plaintiff could change its operating practice at will and without further liability than to pay the tenant lines the value of the work done prior to the change. The supposed dilemma, therefore, is not one created by inconsistent contractual obligations giving others the right to do the work or serious probability that they will be asserted. It is entirely immaterial that the work has been done by the tenant lines rather than by plaintiff in some other way. Whether it is done by plaintiff itself or by others, plaintiff must bear its cost. That is an inevitable consequence of its decision not to put the award into effect. So is the risk that the employee may succeed in an enforcement suit and thus subject plaintiff to possible liability for damages for breach of the collective agreement.

The dilemma therefore boils down to the fact that plaintiff will have to bear the expense of having the work done, consequent to its own election not to accept the award, and, if an employee succeeds in an enforcement suit, whatever damages for breach of the collective agreement may be claimed and proved. These consequences of its election to maintain the *status quo* cannot have been without the contemplation of Congress when it adopted the enforcement procedure. They hardly present the difficulties which would arise from independent agreements allocating the work to different persons or groups. We do not think the enforcement procedure is made constitutionally inadequate merely because the carrier prefers, as is its right, not to put the award in force, but to follow an advantageous practice which it could change at will and, consequently, to incur the necessary expense of doing so.

But, if it were shown that the carrier had bound itself by conflicting contracts allocating the work, and thus the dilemma were complete, it would not follow that the enforcement suit is inadequate or was not intended to be exclusive or that declaratory relief would be appropriate. We know of no constitutional protection against the consequences of making inconsistent contracts concerning the same subject matter nor of any which renders inadequate a proceeding, otherwise sufficient, merely because others not parties to it may assert claims inconsistent with its result and perhaps succeed in sustaining them by independent litigation. The risk of multiple liability, that is, the possibility that two or more claimants may assert, severally and independently, similar causes of action covering identical subject matter, is an everyday occurrence. That risk presents a common and peculiarly appropriate situation for declaratory relief when it can remove the risk and other adequate relief is not available. But so to apply the declaratory judgment procedure is vastly different from applying it where, as here, it could not remove the risk and where it would displace a special remedy provided for decision of

highly complex and specialized questions. The primary purpose of the Declaratory Judgments Act is to give relief in situations in which it was not previously available, not to displace existing and, particularly, special remedies devised for peculiar situations. Nor is it intended to remove all risk of multiple liability. That, unfortunately, is a function not covered as yet by legal invention.

Finally, if it were clear that allowing plaintiff to maintain this suit would eliminate or minimize its risk of multiple liability, that advantage to plaintiff still would have to be weighed against the corresponding disadvantages created for the employees and the adverse effects upon the whole statutory plan. Plaintiff's disadvantage under that plan comes down to having the initiative in litigation concerning awards given to the employees for two years. That price hardly seems unreasonable for Congress to exact in exchange for the strong defensive position given the employer with respect to the award and the prompt disposition of disputes which the Act has made possible. The statute denies the employee the more usual advantages of administrative decision, namely, immediate effectiveness unless stay is secured, limitation of judicial review to questions of law, enforcement by public authority, etc. It gives him only decision, not action, by the Board. It puts upon him the whole burden of enforcement. In view of all these relative advantages and disadvantages, we find no essential unfairness in leaving to the employee the decision whether the award shall be enforced and limiting the period in which his decision can be made to two years. Certainly there is no discrimination beyond the power of Congress to create. Suspension of the carrier's initiative in litigation for that period of time is not an infringement of constitutional right. As we have said, to hold otherwise would disrupt the working of the Railway Labor Act, as well as deprive the employee of the statutory special advantages in the enforcement suit. These consequences forbid the implication that Congress intended them.

The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore* v. *Illinois Central R. R.*, *supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act. When it chooses the latter, we think it is bound to follow it through to the conclusion prescribed by the statute. Such a choice is made, we think, not only when the carrier submits or joins in submitting the dispute to the Board, but when, under submission by an employee, it appears before the Board and participates in a full hearing on the merits. Having done these things, had the chance of a favorable decision, and finally, when it has lost, been confronted only with an order not enforceable except by a suit which has not been brought, which it seeks in effect to forestall by this one, and in which, if begun, it would have had a full day in court, plaintiff cannot complain that it has not had complete opportunity to protect its rights or that they have not been protected adequately.

What plaintiff attacks, fundamentally, is the whole idea of the enforcement suit plan. The provisions for the enforcement suit are unusual. Some of the features of the administrative phase of the statute are unique. But enforcement suits are not unknown,[32] and

[32] *Cf.* Sections 16 (1), 16 (2) of the Interstate Commerce Act [34 STAT. 590 (1906), as amended by 36 STAT. 554 (1910) and 41 STAT. 491 (1920)] and Sec-

neither the fact that they are unusual nor the other that the administrative provisions and procedure are unique renders the Act unconstitutional. It is the total effect of the two phases, not the segmented effect of the first, which must determine that question. The administrative phase has been criticized. On the other hand, it has been commended. No doubt there is room for considerable improvement.[33] But these matters are for Congress' judgment. The present Act has evolved from a long legislative history. Many of its unique features are derived from that.[34] Though the administrative features are frankly not in the accustomed traditions and methods of courts and lawyers,[35] the enforcement suit follows them except possibly as to the initiative in litigation. That it may not do so in this single respect does not, as has been shown, deprive the carrier of legal protection according to due process of law.

Nor does it that Congress may have intended to discourage resort to the courts for enforcement of awards and settlement of these disputes after the initial stages of private negotiation and administrative decision, thus securing the prompt disposition which the Act avowedly sought.[36] If that was Congress' intent, its constitutional power over the jurisdiction of the federal courts sustains it both in providing the remedy which it has given and in excluding others. Though some of them were decided before, and at least one after the *Moore* decision was rendered, the decisions cited below, or their implications, appear to bear this out.[37]

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tion 309 (f) Packers and Stockyards Act [42 STAT. 166 (1921)]. As to the former, see Brady v. I. C. C., 43 F. (2d) 847 (N. D. W. Va. 1930), *aff'd*, 283 U. S. 804 (1931); Baltimore & O. R. R. v. United States, 87 F. (2d) 605 (C. C. A. 3d, 1937); Baltimore & O. R. R. v. Brady, 288 U. S. 448 (1933), in the last of which the Court held that claimant, having elected to pursue his administrative remedy before the Commission, was not entitled to recover more than the amount of the award, though he might have done so by suing originally in the district court. See also Meeker v. Lehigh Valley R. R., 236 U. S. 412 (1915), and St. Louis & S. F. R. R. v. Spiller, 275 U. S. 156 (1927); Minds v. Pennsylvania R. R., 237 Fed. 267, 270 (E. D. Pa. 1916), *aff'd*, 244 Fed. 53 (C. C. A. 3d, 1917) and 250 U. S. 368 (1919). Compare note 20 *supra*.

[33] *Cf.* Garrison, *op. cit. supra* note 10, at 593-8; and the guarded recommendations of the Attorney General's Committee on Administrative Procedure, FINAL REPORT (1941) 185-8.

[34] *Cf.* SPENCER, *op. cit. supra* note 11, at 8-12; Garrison, *op. cit. supra* note 10, at 568-76; and the FINAL REPORT, cited in the preceding note, at 185.

[35] *Cf.* Garrison, *op. cit. supra* note 10, at 598: "It is difficult to conceive of the Board's being able to discharge its functions under any set-up which would fit within these traditional legal concepts."

[36] *Cf.* Meeker v. Lehigh Valley R. R., 236 U. S. 412 (1915); St. Louis & S. F. R. R. v. Spiller, 275 U. S. 156 (1927). In Cook v. Des Moines Union Ry., 16 F. Supp. 810, 813 (S. D. Iowa 1936), Dewey, District Judge, said, with reference to the provision of the Act that the award "shall be final and binding upon both parties": "It is unnecessary to determine whether or not this might be a depriving of due process in certain cases . . . The purport of the act may be to provide that the award made by an Adjustment Board shall be final so long as it is not attempted to be enforced . . . Therefore there is no deprivation . . . of any rights unless and until the suit is filed in the District Court . . . When this is done it becomes an action at law with the right of a jury. The entire case is open for trial as a law action on the original suit."

[37] See Railroad Yardmasters of North America v. Pittsburgh & Lake Erie R. R., 39 F. Supp. 876 (N. D. Ohio 1940). See also Adams v. New York, Chicago & St. L. R. R., F. (2d) (C. C. A. 7th, 1941), 3 C. C. H. Labor Service 60,509, decided after the decision in the *Moore* case was rendered, and distinguishing Nord v. Griffin, 86 F. (2d) 481 (C. C. A. 7th, 1936). However, on June 24, 1941, the opinion was withdrawn, to the extent that it conflicted with the *Moore* decision, and a judgment of reversal was substituted for the previous one affirming action of the district court in refusing to exercise declaratory jurisdiction (C) (1941)

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Finally, this is a suit for a declaratory judgment. The remedy is discretionary.[38] We do not believe a carrier, consistently with the Railway Labor Act, could maintain a suit in equity to set aside an award or enjoin its enforcement. The statute seems clearly to exclude such suits by specifying enforcement suits solely as a method of review, and the absence of reported cases showing attempts to maintain other types of suit supports this view. The declaratory action has much of equitable quality in regard to the discretion which should be exercised in allowing relief. Its effect here, if plaintiff should be successful, would be substantially the same as setting aside the award or enjoining enforcement. Consequently, we can see no valid reason for excluding these remedies which does not apply with equal force to that by declaratory judgment, whether as a matter of Congressional intent or one of judicial discretion in allowing that relief. To allow it also would deprive the employee of his special advantages in litigation. It would displace another, and in our view, an adequate judicial remedy specially devised for the particular situation. When this is the effect, courts generally deny declaratory relief.[39] The doctrine of "primary jurisdiction" [See Note (1938) 51 Harv. L. Rev. 1251] and considerations of comity toward a specialized administrative tribunal charged to deal with such matters lend weight to the view that it should be denied in these circumstances. The former has been applied most frequently when the administrative body has exclusive jurisdiction, or where exhaustion of the administrative remedy is required, to prevent the suit from being premature or to give the court the benefit of the administrative judgment in advance of its own action. The present case is one appropriate for the same attitude, even though it was not regarded as appropriate for the situation in *Moore* v. *Illinois Central R. R.*, *supra*. Furthermore, the railroad employees who are now doing the disputed work, or their union representatives, have not been made parties to the action. Their rights may be affected by the result. In these circumstances also declaratory relief ordinarily is refused.[40] All these considerations apply not only to show the intention of Congress, but also to guide the court's discretion toward denial of declaratory relief.

The reasons we have stated support the view that the court did not have jurisdiction to entertain the present suit. But, whether or not it had jurisdiction, the action was premature. For practical purposes it matters little whether one or the other reason constitutes the basis for decision. The important thing is that the statute gave the initiative in litigation to review the award to the employee for two years. For disposing of this case, it is immaterial whether this amounted to a mere suspension, for that period, of the employer's right to sue or was intended, with other provisions of the Act, to bar it altogether. It seems clear that the limitation upon the employee's right to sue was intended to bar action by him after the two years expire; otherwise it would be meaningless.[41] That being true, his failure to sue within the time might be regarded reasonably as disposing finally of his claims determined by the award. Correspondingly, it might be held, with reason, that there would be no need for suit by the carrier after that time, and therefore that the court was deprived of jurisdiction. But we need not and do not decide whether either the

[38] *Cf.* BORCHARD, DECLARATORY JUDGMENTS (2d ed., 1941) 298-314.

[39] *Id.* at 342-346, and authorities cited; 16 AM. JUR. 295, § 21.

[40] *Cf.* BORCHARD, *op. cit. supra* note 38, at 255, 299, 304. See also Section 6, Declaratory Judgments Act.

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employee or the employer could sue after expiration of the two years. The facts do not present these questions. But, in any event, if it is assumed that the employer may wait until the period of limitations has passed and then bring its action, its right to bring it within that time is clearly barred. If that were not true the statute would be meaningless in giving the employee the initiative in litigation and the special statutory advantages, as well as in placing a limitation upon the time for his suit.

There is no escape from this conclusion in the assertion that this suit is one to enforce rights arising under the original agreement, not to review or nullify the award, and therefore the statutory bar or suspension does not operate against it. As we have said, the fundamental issue presented in this action is identical with that determined by the award and with that which would be decided by an enforcement suit, namely, whether the employees have the right under the contract to do the work in dispute. That issue cannot be decided in independent litigation and in favor of plaintiff without nullifying the award and the consequences which the statute attaches to it in the enforcement suit. To assert therefore that the only rights involved in this suit are rights arising at common law under the contract, and that the rights given to the employee by the statute are not affected or involved, is either to beg the question or to ignore the inescapable effects of this suit, and the relief it would afford, upon the latter. What the plaintiff really seeks to do is to have all of the advantage of the statutory plan up to the point of the award and enforcement, and to escape from its disadvantages thereafter. We do not think it is so entitled to have its legal cake and eat it too.

Limiting the decision therefore squarely to the facts and the issues which they present, we find no constitutional inadequacy in the protection afforded to the plaintiff under the provisions of the Railway Labor Act, merely by reason of the fact that its right to initiate litigation to nullify an award is barred or suspended for a period of two years.

The judgment is

Affirmed.

STEPHENS, *Associate Justice*, dissenting. This is an appeal from an order of the District Court of the United States for the District of Columbia dismissing the complaint of the appellant. The complaint was for a declaration, under the powers given United States courts by the Declaratory Judgments Act (Act of June 14, 1934, 48 Stat. 955, as amended by Act of August 30, 1935, 49 Stat. 1027), of the rights of the appellant and the appellees under a certain collective bargaining contract of February 1, 1923. The appellees, defendants below, filed an answer setting up three defenses. The first was that the complaint failed to state a cause of action, the second, that it did not state a cause of action appropriate for the granting of a declaratory judgment.[1] The court below considered these two defenses as in the nature of a motion to dismiss and its dismissal of the complaint was upon

[1] More particularly, the second defense said that the allegations of the complaint did not state a cause of action appropriate for the granting of the declaratory judgment against the defendants because:

"(1) The complaint fails to show the existence of an actual controversy between the plaintiff and the defendants.

"(2) The complaint affirmatively shows that there exists a remedy specially provided by statute for this type of case.

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such motion. In view of the disposition of the case on the first and second defenses, the third defense was not considered. The case is thus before the court upon the facts set forth in the complaint as admitted by the first two defenses treated as a motion to dismiss. These facts are set forth in detail in the margin.[2] Stated in general and summary terms they are as follows:

The appellant is a corporation which since 1907 has operated the Union Passenger Station, including an adjacent railroad yard and tracks, hereinafter sometimes called the Terminal, in Washington, District of Columbia. The appellees are enginemen and firemen employed by the appellant who operate switch engines over the tracks in the yards. These yards and tracks and the passenger station are facilities used by the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Chesapeake and Ohio Railway Company—called the Tenant Lines—operating passenger trains from points outside of Washington to Washington, from Washington to points outside, and from points outside through Washington to other points outside. In addition to the movement of loaded passenger trains into, out of, and through the Terminal, certain other train or car movements—the right to make which is involved in this case—have since 1907 taken place and now take place over the tracks of the appellant: Empty passenger trains which have discharged their passengers at the station are moved to the storage yard; trains of empty passenger cars are moved from the storage yard to the station for the purpose of taking on passengers and leaving for their destination; where trains of passenger cars have

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"(3) The complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure a judicial review of a decision of an administrative board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act.

"(4) The complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff."

[2] 1. The appellant Washington Terminal Company is a corporation which has since 1907 operated the Union Passenger Station, a union railroad terminal, hereinafter sometimes called the station or the Terminal (where the word "station" is used it refers to the passenger station building and sheds proper) in the District of Columbia. The appellees are employees of the appellant performing services in the Terminal as enginemen or firemen on yard engines used in switching service.

2. The appellant itself operates no passenger trains and employs directly no road engine or road train crews. All passenger trains which use the Terminal are operated by one or more of certain railroad companies known as the Tenant Lines, to wit, the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Chesapeake and Ohio Railway Company. The trains operate for the major portion of their runs on the tracks of one or more of the Tenant Lines between Washington and various other cities, and they use the tracks and facilities of the appellant for only a short distance in entering and leaving the Terminal.

3. The movement of loaded passenger trains from points outside of Washington into the Terminal, from the Terminal to points outside of Washington, and through the Terminal from points outside of Washington to other points outside, is performed and has always been performed since the opening of the Terminal exclusively by road engines manned by road engine crews of the Tenant Lines.

4. When passenger trains begin or end their runs at Washington, such road engine crews are and have always been required by the Tenant Lines to deliver the road engine to the enginehouse at the end of a run and to bring the road engine from the enginehouse to the station at the commencement of a run. Thus

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come into the station one or more cars are sometimes cut off from the head end of the train and removed in a single movement to some designated track; where a train of passenger cars is standing in the station before departure one or more cars are sometimes moved from another track against the head end of such train and coupled on to form a part of the train on its journey over the road; when trains of passenger cars have come into the station and discharged their passengers, the empty trains are sometimes moved a sufficient distance to permit the road engine which has brought the train into the station to be uncoupled from the train and proceed by a cross-over movement to another track. Many movements of the kinds just described are and always have been, since the commencement of operation of the Terminal in 1907, performed (where in the judgment of the managing officers of the appellant efficiency or promptness in the operation of the Terminal is thereby promoted) by the use of the road engine which has brought the train into the station or is about to haul the train to its destination, incidental to the movement of the road engine between the station and the enginehouse. In making such movements the road engine is and always has been manned by the road engine crew which is required as a part of its duties to deliver the road engine to the enginehouse at the end of a run and to bring the road engine

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the road engines when so operated over the appellant's tracks between the passenger station and the enginehouse are and always have been manned by the Tenant Lines' road engine crews.

5. In addition to the movement of loaded passenger trains into, out of, and through the Terminal, certain other movements of equipment take place over the tracks of the appellant as follows: Empty passenger trains which have discharged their passengers at the station are moved to the storage yard; trains of empty passenger cars are moved from the storage yard to the station for the purpose of taking on passengers and leaving for their destination; where trains of passenger cars have come into the station one or more cars are sometimes cut off from the head end of the train and removed in a single movement to some designated track; where a train of passenger cars is standing in the station before departure one or more cars are sometimes moved from another track against the head end of such train and coupled on to form a part of the train on its journey over the road; when trains of passenger cars have come into the station and discharged their passengers, the empty trains are sometimes moved a sufficient distance to permit the road engine which has brought the train into the station to be uncoupled from the train and proceed by a cross-over movement to another track. Many movements of the kinds just described are and always have been, since the commencement of operation of the Terminal in 1907, performed, where in the judgment of the managing officers of the appellant efficiency or promptness in the operation of the Terminal is thereby promoted, by the use of the road engine which has brought the train into the Terminal or is about to haul such train to its destination, incidental to the movement of the road engine between the station and the enginehouse; and in making such movements the road engine is and always has been manned by the road engine crew which is required as a part of its duties to deliver the road engine to the enginehouse at the completion of a run and to bring the road engine from the enginehouse to the station at the commencement of a run.

6. Movements over the tracks of the appellant other than those described in paragraphs 4 and 5 above are made and have generally been made by yard-engines of the appellant manned by yard-engine crews employed by the appellant.

7. On June 1, 1910, the appellant published certain rules and regulations for yard-engine firemen in its employ, defining the terms of employment and the rights of employees thereunder; on September 1, 1911, the appellant published certain rules and regulations for the government of yard enginemen in its employ, defining the terms of employment and the rights of the employees thereunder. These regulations separately defining the employment of yard firemen and yard enginemen were superseded on December 1, 1919, by a "Schedule of Rules and Rates of Pay for Enginemen, Firemen and Yardmen" entered into by and between the Director General of Railroads of the United States on behalf of the Washington Terminal Railroad (the appellant) and the enginemen, firemen and

from the enginehouse to the station at the beginning of a run. The road engine crews are employees of the Tenant Lines.

On February 1, 1923, the yard enginemen and firemen, employees of the appellant, acting through the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen as collective bargaining representatives, entered into a seniority agreement defining the terms of employment of enginemen and firemen. This superseded several previous agreements on the same subject. After the passage of the Railway Labor Act of 1934 (Act of June 21, 1934, 48 Stat. 1185), which set up a National Railroad Adjustment Board, hereinafter sometimes called the Board, for the adjustment of disputes between carriers and their employees, the appellant's employees asserted that under the agreement of February 1, 1923, they were entitled to perform the train movements above described as involved in this case. The appellant rejected the claim. Thereafter the employees carried the dispute, as under the Railway Labor Act they might, to the Board, to which they submitted their claim in writing; and the appellant, as it was obliged to do under the statute, separately stated its contentions to the contrary of the claim. The Board, acting through its First Division of ten members, deadlocked, but, upon the selection of a referee as an eleventh member, it

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trainmen employed thereon represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen, respectively. On February 1, 1923, the appellant entered into an agreement with the yard enginemen and yard firemen in its employ represented by the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, respectively, entitled "Schedule of Rules and Rates of Pay for Enginemen and Firemen." This agreement remains and has remained in effect since its date as the only contract existing between the appellant and the enginemen and firemen in its employ, including the appellees, defining the terms of employment of enginemen and firemen. This agreement contains provisions establishing certain rights of seniority as between the appellant's employees belonging to each respective class covered by the regulations or schedules therein contained, these provisions among other things entitling the employees of a given class to vacancies and new runs in the order of seniority of the applicants therefor, providing for seniority as a factor in promotion, and according recognition in similar respects to length of service in a particular employment.

8. At the date when the regulations of June 1, 1910, went into effect and continuously thereafter during the period when the various regulations and schedules above referred to were successively in effect and continuously during the period since the schedule of February 1, 1923, has been in effect, the uniform and continuous usage and practice has been for movements of the character described in paragraph 5 above to be made by road engines manned by road engine crews of the Tenant Lines whenever in the judgment of the appellant's managing officials efficiency or promptness in the operation of the Terminal was thereby promoted; and a large proportion of such movements have always been and are being so performed by such road engines and road engine crews.

9. By Act of Congress of June 21, 1934 (48 Stat. 1185), entitled "An Act to amend the Railway Labor Act approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employees," there was established a board known as the "National Railroad Adjustment Board" with jurisdiction over disputes growing out of the interpretation or application of agreements between railroads and their employees concerning rates of pay, rules or working conditions, in the event that negotiations in respect of such disputes have failed to result in adjustment. The First Division (there are three others) of the Adjustment Board has jurisdiction over disputes involving yard and train service employees, including engineers, firemen, conductors, trainmen, and yard service employees. It consists of ten members, five designated by the carriers, and five by national labor unions of employees. Hereinafter sometimes this Division is referred to as the Board.

10. After the passage of the Railway Labor Act there was presented to the appellant by representatives of the firemen, enginemen and trainmen employed by

made an award on October 24, 1938, to the effect that the appellant's employees were entitled to perform the train movements in question. This award was made effective by an order of the Board of the same date. Except as the separate submissions filed with the Board may be regarded as such, the Board in considering the dispute received no pleadings or evidence and permitted no cross-examination; and it allowed no argument, written or oral, before the referee.

The appellant has never changed its operating practices to conform to the award. The Railway Labor Act authorizes a proceeding to enforce the award and order to be brought in an appropriate United States District Court by the persons for whose benefit the award was made, within two years from the time the cause of action accrues

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it a claim to the effect that the work being performed on the property of the appellant by road engines manned by road engine crews of the Tenant Lines, as described in paragraph 5 above, was work to which yard engine crews of the appellant were exclusively entitled by reason of seniority rights under the agreement of February 1, 1923. After negotiations between the appellant and representatives of the firemen, enginemen and trainmen had failed to result in agreement, the representatives, on March 29, 1937, invited the appellant to join with them in the submission of the claim to the Board. The appellant declined to do this on the ground that the claim was not based on violation of any agreement and amounted to a demand that operating practices should be abandoned which had existed continuously since the commencement of the operation of the Terminal. Notwithstanding such refusal by the appellant there was thereafter filed with the Board by representatives of the employees a claim reading in part as follows:

"It is the practice of The Washington Terminal Company to require tenant line road engines manned by tenant line road engine crews to move dead equipment from the depot to the coach yards, move dead equipment from the coach yards to the depot and perform other switching service on tracks of the Washington Terminal Company. . . . Train and enginemen of the Washington Terminal Company claim that all such work should be performed by men holding seniority exclusively on the rails of the Terminal Company."

11. Thereafter within thirty days, pursuant to notification and requirement by the Board, the appellant filed its "submission" in answer to the claim, and at a date fixed by the Board the representatives of the employees and a representative of the appellant appeared before the Board at Chicago, Illinois. In accordance with the established procedure of the Board no witnesses were called to testify and no evidence was produced of the facts relied upon by the representatives of the employees in support of their claim, but these representatives made certain statements which were alleged to be facts and which were received by the Board without any opportunity being given to the appellant to cross-examine the representatives or otherwise to test the competency of their statements or to verify their existence as facts. At hearings before the Board the established procedure affords no opportunity to parties against whom claims have been filed to produce witnesses or by other means to introduce evidence in resisting the claims, and the procedure makes no provision for and does not permit the making of any record, stenographic or otherwise, of the proceedings before the Board. In accordance with this procedure no opportunity was given to the appellant to produce witnesses or by any other means to introduce evidence in resisting the claim presented by the representatives of the employees, and no record was made of the hearing.

12. Thereafter the Board was apparently unable to reach a determination of the claim, through deadlock or inability to secure a majority vote of the Board members, and, under the provisions of paragraph (1) of Section 3 of the Railway Labor Act, a referee was selected to determine the claim. In accordance with the established practice of the Board no opportunity was given to the appellant to appear before the referee and defend itself against the claim either by the presentation of evidence or oral or written argument, and the appellant was not notified by the Board that a referee had been designated to make an award.

13. Thereafter the referee decided the claim in favor of the employees and on October 24, 1938, this decision was adopted and published by the Board in a

under the award. No such suit had been brought by the employees at the time of the filing of the instant action on December 29, 1938. Nevertheless, the employees, shortly after the date of the award and order of October 24, 1938, to wit, on November 23, following, made demands—and they continue to make such demands—upon the appellant for moneys alleged to be due them for the train movements in question although, since the appellant has not changed its operating practices, the employees do not actually perform these train movements. These demands amount for the period from November 23, 1938, to the date of filing the complaint to approximately $7,500, and they are accumulating at the rate of $80,000 per annum. The con-

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form consisting of a complete verbatim reproduction of the ex parte submissions of the employees and of the appellant respectively filed with the Board, followed by the words:

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The work described in this docket is within the jurisdiction of the men holding seniority exclusively on the rails of the Washington Terminal Company.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD

By order of First Division
Attest(s) T. S. McFarland

Secretary."

The Board served upon the appellant an "Order" "to make effective Award No. 3115, made by the First Division of the National Railroad Adjustment Board . . . as therein set forth; and if the Award includes a requirement for the payment of money, to pay to the employee (or employees) the sum to which he is (or they are) entitled under the Award on or before November 23rd, 1938."

14. The appellant has not complied with the order, but since the date thereof movements of the character described in paragraph 5 above have continued to be made, where in the judgment of the managing officers of the appellant promptness or efficiency in the operation of the Terminal would be promoted, by road engines manned by road engine crews of the Tenant Lines. Accordingly, under paragraph (p) of Section 3 of the Railway Labor Act the employees or any of them, as firemen or enginemen employed by the appellant in the operation of its yard engines and therefore as persons for whose benefit the Board order was made, have been at all times since the date of the order, and are, authorized and empowered to file in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which any one of such employees resides, a petition praying the court to make such order and enter such judgment as it may determine to be proper to enforce or set aside the order of the Board. But none of the employees has filed such a petition in the District Court of the United States for the District of Columbia or in any other District Court of the United States.

15. Notwithstanding that none of the employees has instituted any proceeding such as is referred to in paragraph 14 wherein the appellant would have opportunity and be entitled to show that the employees do not have any right under the contract of February 1, 1923, or otherwise, to perform movements of the character described in paragraph 5 above, and wherein the appellant might pray the court to set aside the order of the Board as unlawful, invalid and in excess of the jurisdiction of the Board, none-the-less the employees and each of them have, beginning November 23, 1938, presented, and are continuing to present, to the

tinuance of these demands and of the controversy concerning them may interrupt performance of the appellant's duty to serve the public. This action was filed by the appellant in the United States District Court to obtain a declaratory judgment of the rights and rela-

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appellant claims and demands for sums of money other than the full day's wages which the employees earn for each day on which they actually do work. These demands are based upon the employees' alleged right to perform movements of the character described in paragraph 5 above, which they are not in fact performing but which are being performed by road engine crews of the Tenant Lines. The demands so made by the employees are in the nature of claims for penalty payments and are in excess of the amounts which the employees would earn if they actually performed work of the character to which they claim they are entitled, many such demands being for another full day's pay in addition to the full day's pay which the claimants are already earning, the claim for such extra day's pay being based upon the fact that the claimant has not been given an opportunity to perform some one specific movement of the character mentioned in paragraph 5, the performance of which movement would involve only a few minutes work. These claims and demands are rapidly accumulating from day to day and amount for the period from November 23, 1938, to the date of filing the complaint (December 29, 1938) to a total of approximately $7,500, and are thus accumulating at the rate of approximately $80,000 per annum.

16. An actual controversy therefore exists between the appellant and the employees concerning their respective rights under the contract of February 1, 1923. This controversy resulted from the purported award of the Board of October 24, 1938, and comprehends the claims and demands, above described, upon the appellant for the payment of sums of money under the contract of February 1, 1923. The appellant is without an adequate and complete remedy at law in the premises and for want of such remedy is subjected to serious damage and inconvenience in this: There is no means by which the appellant can force or induce the employees or any of them to institute a judicial proceeding such as is referred to in paragraph 14. The Railway Labor Act provides no method whereby the appellant may petition any court of competent jurisdiction to set aside the award and order of the Board, and meanwhile the demands for money payments made by the employees are accruing and accumulating in the large amounts described. Although the issues, upon the determination of which the validity of the demands and the liability of the appellant to satisfy them depend, are as a matter of evidence and proof capable of present determination, the appellant, by reason of there being no judicial determination of its liabilities with respect to the demands, is compelled to maintain and make available substantial amounts of money to satisfy the demands in the event that the employees or any of them should subsequently institute legal proceedings to enforce the award and order, and in the event that it should in such proceedings be determined that the appellant is legally liable to pay the demands. If advised at the present time by proper judicial construction of its rights and liabilities under its contract with the employees, the appellant would, if necessary, be enabled, by making readjustments of its operating arrangements, to fulfill its obligations to the employees at less expense than by incurring the heavy penalty payments which the employees are now demanding. So long as the employees continue to make such demands without instituting legal proceedings wherein the validity of their demands can be adjudicated, and so long as the present controversy between the appellant and the employees with respect to their respective rights and liabilities under the contract remains without judicial determination, a serious impediment exists to the proper and adequate fulfillment of the appellant's obligation to serve the public which may, as a result of delay in securing an adjudication that will settle the controversy, ultimately impair and interrupt the performance of such service. By reason of each and all the facts set forth above the only remedy of the appellant, in order to avoid irreparable injury and damage, was to bring this suit in equity, praying a declaratory judgment or decree relative to the actual controversy described, and a declaration of the rights and other legal relations of the appellant and the appellees with respect to such controversy.

Wherefore the appellant prayed that the court render such a declaratory decree or judgment, including a declaration that the appellees have, under the seniority agreement of February 1, 1923, no legal right to perform the work in question, and that the award of the Board, insofar as it purports to confer such right upon them, is invalid.

tions of the appellant and the appellees under the seniority agreement of February 1, 1923—the appellant contending that the appellees have no right to the work in question under that agreement or otherwise and that the award purporting to confer any such right is invalid, and asserting that it has no other adequate remedy, that the enforcement proceeding is not such so far as a carrier is concerned.

But the question immediately involved on this appeal is not what are the rights of the parties under the contract. It is, broadly stated, whether or not a carrier, party to a collective bargaining agreement with its employees, may obtain a judgment in a United States District Court declaring the rights of the parties to the agreement, notwithstanding that a dispute arising out of the interpretation of the agreement has, at the instance of the other party, the employees, been submitted to the National Railroad Adjustment Board and made the subject of an award and order by the Board in the employees' favor. I think that the carrier is entitled to such a judgment.

I

The Federal Declaratory Judgments Act provides, so far as immediately pertinent:

> (1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such. [Act of June 14, 1934, 48 Stat. 955; as amended by Act of August 30, 1935, 49 Stat. 1027.][3]

The facts stated in the appellant's complaint and admitted by the motion to dismiss constitute an orthodox cause for declaratory relief. From them there appears the existence of a dispute between the appellant and the appellees concerning the meaning of an agreement to which they are parties. The appellees have presented claims to the appellant for money—the theory of the claims being that the contract of February 1, 1923, entitled them to do certain work; the appellant contends that the contract does not entitle them to do that work. The demands of the appellees are made under the contract, not under the award or order of the Board. This was conceded by the appellees in the court below.[4] Thus the complaint is one for declaration of

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[3] Additional provisions of the Act are the following:

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

[4] The Memorandum Brief filed by the appellees as defendants in the trial court was made a part of the record on appeal. In that brief the appellees said: "These claims, however, are *based upon the Agreement of* 1923—*not upon the order of the Board.*" R. 117. ". . . when the individual defendants presented to the plaintiff, individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order which has no substantive effect

"rights and other legal relations" of the parties to a contract. And the case is one of "actual controversy." It is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937). It is "a real and substantial controversy admitting of specific relief under a decree of a conclusive character." *Idem. Cf.* also *Maryland Casualty Co.* v. *Pacific Oil and Coal Co. and Joe Orteca*, 312 U. S. 270 (1941). Under the facts stated, daily demands for money are being made by the appellees under the contract, and refusal of payment is being made by the appellant; and the continuance of the controversy without adjudication is an impediment to the fulfillment of the appellant's duty to serve the public which may interrupt performance of that duty.

Moreover, under the facts, the appellant is obliged, in the absence of a declaratory judgment, to maintain moneys in large sums to pay the appellees' demands if ultimately held liable therefor, and as these are accumulating each day for each employee for the day's wages for work not performed, the appellant must either have to pay the full accumulation of these demands, if eventually held liable therefor, or waive its rights once for all and immediately change its operating practices at greater expense and less efficiency; but if the appellant is presently advised of its duties, it could if necessary now change its operating practices and thus save the heavy penalty payments being demanded. In *Aetna Life Ins. Co.* v. *Haworth*, *supra*, the mere increase in the amount of insurance policy claims through the accrual of interest, and the inconvenience of having to be prepared to meet the claims at some future time, were held sufficient grounds for declaratory relief in respect of legal rights and obligations arising under insurance contracts. *A fortiori* the uncertainties and hazards to which the appellant under the facts stated in the instant case is subjected are sufficient to invoke exercise of declaratory jurisdiction. In *E. Edelmann & Co.* v. *Triple-A Speciality Co.*, 88 F. (2d) 852, 854 (C. C. A. 7th, 1937), Lindley, District Judge, speaking for the court, said, in respect of the purpose of the Declaratory Judgments Act:

> . . . It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued. . . .

This statement is borne out by the legislative history of the Act. The Judiciary Committee of the Senate, in recommending its passage, said:

> It enables disputes arising out of written instruments, or otherwise, to be adjudicated without requiring a destruction of the status quo and of the social and economic fabric. Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed. [Sen. Rep. No. 1005, 73rd Cong., 2d Sess., 1934]

In Borchard on DECLARATORY JUDGMENTS (1934), the leading text on the subject, it is stated that one of the important functions of declara-

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and is in itself unenforceable. . . . The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued." R. 119. "It is thus apparent that the dispute between the parties to this case is one growing out of the interpretation and application which the carrier has made of the Collective Agreement of 1923, and that it has existed for some time." R. 71.

tory judgment statutes is to afford an opportunity for determination of rights and liabilities under contracts. The author says (p. 405):

> . . . The opportunity to adjudicate such disputes without disruption of the relations between the parties, whether before or after purported breach, has demonstrated the utility and efficacy of the declaratory action, for it has enabled the parties to weather the storm of dispute without wrecking their legal craft and, on the contrary, to continue on the course with a clearly defined chart. Especially in long-term contracts has this proved an exceptional advantage, for it must be conceded that the traditional method of suing for damages on the first suggestion of breach frequently makes the continuation of the relation impossible. . . .

And see 16 American Jurisprudence 305, § 31, to the same effect.

Presumably declaratory judgment actions concerning contracts have in the majority of instances had to do with business contracts. But the suitability of declaratory relief for the determination of rights and liabilities under collective bargaining agreements is not to be doubted; it is indeed especially appropriate because of the public interest indirectly affected by such agreements. And both before and since the enactment of the Railway Labor Act of 1934 the courts have entertained proceedings for declaratory judgments as an appropriate remedy in respect of disputes arising out of agreements between carriers and their employees. See *Piercy* v. *Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); *Burton* v. *Oregon-Washington R. & Nav. Co.*, 148 Ore. 648, 38 P. (2d) 72 (1934); *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936).

Since the appellant's complaint thus states a case appropriate for the exercise of the declaratory judgment jurisdiction of a United States District Court, and since under the due process clause of the Fifth Amendment to the Constitution the courts are open to all who present a controversy which is the proper subject of judicial action, it follows necessarily that the trial court should not have dismissed the appellant's complaint unless some expression of Congressional intent, some principle or policy of law of which Congress must be said to have known, some necessary implication of statutory language, or of legislative history, forbade exercise of the jurisdiction. The question is one of Congressional intent. Was it the intent of Congress that the declaratory judgment jurisdiction of the District Courts should not be exercised under the circumstances of the instant case?

II

No language of Congress in the Declaratory Judgments Act expressly excepts any cases of actual controversy, save those with respect to Federal taxes, from the jurisdiction of the District Courts to declare rights and other legal relations. No language of the Railway Labor Act of 1934 expressly forbids exercise of the declaratory judgment jurisdiction of the District Courts in respect of disputes arising out of collective bargaining agreements between carriers and their employees, or expressly vests in the District Courts, in the judicial enforcement proceedings provided for by paragraph (p) of Section 3 of the Labor Act, exclusive jurisdiction to determine or adjudicate the rights under such a collective bargaining agreement. One must therefore look to principles or policies of law, implications of statutory language, and legislative history, for an answer to the question in the case.

III

Declaratory relief is not new. It dates—so far as Anglo-American legal history alone is concerned—from several centuries ago in Scotland and from the middle of the nineteenth century in England. There was a declaratory judgments statute in Rhode Island in 1876, in Maryland in 1888, in New Jersey in 1915; and by 1934, the year in which the Federal act was passed, some thirty-four American states and territories had adopted declaratory judgments acts. See BORCHARD, *op. cit. supra*, 237-245. In the course of the growth of declaratory judgments law, principles or policies of limitation were judicially recognized; and it is to be assumed that Congress, in passing the Federal act, intended that the exercise of jurisdiction for declaratory relief should be subject to such limitations of principle or policy as had prior to the passage of the Act been judicially recognized. The appellees urge as one such limiting principle or policy that a remedy by declaratory judgment cannot be invoked as a substitute for any special statutory proceeding. This is put by BORCHARD, 156-7, thus:

> Where . . . a *special statutory* method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case, and it was not intended that a declaration should be employed for such a purpose. This, however, is quite different from refusing a declaration merely because a general or common-law remedy might have been invoked.

To similar effect see 16 American Jurisprudence 295, § 21. Does the Railway Labor Act of 1934 provide a special statutory method or prescribe a statutory tribunal for the determination of the particular type of case presented in the appellant's complaint—with the effect of forbidding declaratory relief?

The Railway Labor Act of 1934 includes within its enumerated purposes that of providing "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." To this end the Act provides in substance and effect as follows: It is the duty of carriers and their employees to exercise every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of application of such agreements or otherwise, in order to avoid interruption to commerce or to the operation of a carrier. All disputes between a carrier and its employees are to be considered and if possible decided in conferences between representatives designated and authorized so to confer by the carrier and employees interested in the dispute respectively. The Act further states:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. [Section 3(i)]

The Act then sets up an Adjustment Board, composed as a whole of thirty-six members, eighteen selected by the carriers and eighteen by the national labor organizations of the employees, each member to be compensated by the party or parties he is to represent. The Board is composed of four divisions. The first (with which we are here concerned) has jurisdiction over disputes involving train and yard service employees of carriers,[5] and consists of ten members, five designated by the carriers and five by the national labor organizations of the employees from the membership of the full Board. Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, such division is forthwith to agree upon and select a neutral person to be known as "referee" to sit with the division as a member and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock, a referee is to be selected and named by the National Mediation Board—which also fixes and pays the compensation of the referee.[6] The awards of the several divisions of the Adjustment Board are to be stated in writing and a copy furnished the respective parties to a controversy; and the awards are made "final and binding upon both parties to the dispute, except insofar as they shall contain a money award." The Act provides that in case an award is made in favor of a petitioner, the division of the Board making it shall also make an order directed to the carrier to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled on or before a day named. Finally, the Act provides:

> If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of

[5] The other three divisions have jurisdiction over disputes involving other classes of employees. The second and third divisions, like the first, consist of ten members each, five to be designated by the carriers and five by the national labor organizations of the employees. The fourth division consists of six members, three to be designated by the carriers and three by the national labor organizations of the employees.

[6] The National Mediation Board is a board established by the Railway Labor Act of 1934 as an independent agency in the executive branch of the Government. Section 3(1) of the Act provides: "Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees."

The Mediation Board has various other duties not here pertinent.

such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board. [Section 3(p)]

All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after. [Section 3(q)]

It thus appears that within the literal terms of the limiting principle as stated in the text of BORCHARD and American Jurisprudence, *supra*, the Congress has in the Labor Act provided a special statutory method and prescribed a statutory tribunal for the determination of the type of dispute involved in the instant case. And it is urged by the appellees that it is not proper to permit the instant dispute, because it is of the type referred to in the statute, to be made the subject of declaratory relief.

But an examination of the authorities cited by the two texts as evidencing the existence of this limiting principle demonstrates that by a "special statutory method" and a "statutory court prescribed" is meant an exclusive procedure or court. See *Moore* v. *Louisville Hydro-Electric Co.*, 226 Ky. 20, 10 S. W. (2d) 466 (1928); *Mayor of Devonport* v. *Tozer*, 2 Chancery 182 (1902); *Smeeton* v. *Attorney-General*, 1 Chancery 85 (1920); *Flint* v. *Attorney-General*, 1 Chancery 216 (1917); *Haan* v. *Haan*, 133 Misc. 197, 231 N. Y. Supp. 58 (1928); *Mutrie* v. *Alexander*, 23 Ont. L. R. 396 (1911); *N. Y. & O. Ry. Co.* v. *Township of Cornwall*, 29 Ont. L. R. 522 (1913); *Wight* v. *Board of Education*, 99 N. J. Eq. 843, 133 Atl. 387 (1926); *Union Trust Co.* v. *Georke Co.*, 103 N. J. Eq. 159, 142 Atl. 560 (1928) (modified, in other respects, in 105 N. J. Eq. 190, 147 Atl. 439 (1929)). And scrutiny of the authorities cited by these two texts also demonstrates certain grounds of decision which may be the necessary basis of distinction in respect of the instant case. Thus the following involve rights and liabilities not derived from the common law but from statute: *Moore* v. *Louisville Hydro-Electric Co.*; *Mayor of Devonport* v. *Tozer*; *Smeeton* v. *Attorney-General*; *Flint* v. *Attorney-General*; and *Haan* v. *Haan*, *supra*. In the following declaratory relief was refused upon the ground of the existence of another adequate remedy: *Oldham County ex rel. Wooldridge, County Attorney* v. *Arvin, County Road Engineer*, 244 Ky. 551, 51 S. W. (2d) 657 (1932); *Grand Junction Waterworks Company* v. *Hampton Urban District Council*, 2 Chancery 331 (1898); *Washington-Detroit Theater Co.* v. *Moore*, 249 Mich. 673, 229 N. W. 618 (1930); *Stenzel* v. *Kronick*, 102 Cal. App. R. 507, 283 Pac. 93 (1929); *G. Goldberg & Sons* v. *Gilet Bldg. Corp.*, 135 Misc. 158, 237 N. Y. Supp. 258 (1929); *In re Sterrett's Estate*, 300 Pa. 116, 150 Atl. 159 (1930); *Kaaa* v. *Waiakea Mill Co.*, 29 Haw. 122 (1926); *Aetna Life Ins. Co.* v. *Richmond*, 107 Conn. 117, 139 Atl. 702 (1927); and *Kimmell's Appeal*, 95 Pa. Superior Ct. 488 (1929). And in the following declaratory relief was refused because the subject of the dispute was either pending in another action or was *res judicata*:

Proctor v. *Avondale Heights Co.*, 200 Ky. 477, 255 S. W. 81 (1923); *State* v. *Board of Com'rs of Wyandotte County*, 117 Kans. 151, 230 Pac. 531 (1924); *Leafgreen* v. *La Bar*, 293 Pa. 263, 142 Atl. 224 (1928); and *Shearer* v. *Backer*, 207 Ky. 455, 269 S. W. 543 (1925).

Cases especially cited by the appellees in support of the limiting principle above stated also variously deny declaratory relief for reasons similar to those above set forth: *City of Erie* v. *Phillips*, 323 Pa. 557, 187 Atl. 203 (1936), and *Bell Telephone Co.* v. *Lewis*, 313 Pa. 374, 169 Atl. 571 (1934), are rulings in terms of the proposition that a proceeding for a declaratory judgment will not be entertained where another statutory remedy has been specially provided for the character of case in hand. *Petition of Kariher*, 284 Pa. 455, 131 Atl. 265 (1925), contains a dictum to the same effect. But there was a special statute in Pennsylvania which governed the decision in these cases. Act of March 21, 1806, P. L. 558, 559, 4 Smith's Laws, pp. 326, 332 (46 PS § 156). That act provided in Section 13: "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect." And it has been held in Pennsylvania that, by reason of the operation of this act, where a remedy or method of procedure is provided by statute it is exclusive. *Ermine* v. *Frankel*, 322 Pa. 70, 185 Atl. 269 (1936); *White* v. *Old York Road Country Club*, 318 Pa. 346, 178 Atl. 3 (1935); *In re Stetson's Estate*, 305 Pa. 62, 155 Atl. 856 (1931). Thus the statutory remedies, the existence of which were the foundation for the refusal of declaratory relief in *Petition of Kariher*, *City of Erie* v. *Phillips*, and *Bell Telephone Co.* v. *Lewis*, were necessarily exclusive. In *McCalmont* v. *McCalmont*, 93 Pa. Superior Ct. 203 (1928), there was an attempt to secure a declaratory judgment annulling a marriage The Pennsylvania legislature had prescribed detailed procedural requirements necessary to be followed for divorce and annulment. Declaratory relief was therefore refused upon the ground that the statutory remedy was exclusive and that the safeguards thereof to the interests of the state were not to be swept away by the Pennsylvania declaratory judgments act. In *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F. (2d) 321 (C. C. A. 4th, 1937), the refusal of a declaratory judgment was upon the ground that there was another action pending involving the same issue, and upon the further ground that the declaratory judgment sought would not dispose of the entire controversy. *Young* v. *Bridges*, 86 N. H. 135, 165 Atl. 272 (1933), *Stewart* v. *Herten*, 125 Neb. 210, 249 N. W. 552 (1933), and *Moore* v. *Louisville Hydro-Electric Co.* (already briefly commented upon), again illustrate the proposition that by "special statutory remedy" is meant an exclusive remedy. In *Young* v. *Bridges* there was an attempt in a court of general jurisdiction to obtain a declaratory judgment as to the inheritance of personal estate. Jurisdiction to determine such inheritance had been committed to a probate court. In *Stewart* v. *Herten* it was sought to obtain by declaratory judgment a direction for a united corporate guardianship.

The county courts in Nebraska had by statute exclusive jurisdiction in guardianship proceedings. These two cases recognize that declaratory judgment statutes do not enlarge judicial jurisdiction in the substantive sense, but only procedurally. This is of course correct, and was recognized in *Aetna Life Ins. Co.* v. *Haworth*, and *Aetna Casualty & Surety Co.* v. *Quarles*, both cited *supra*. In *Moore* v. *Louisville Hydro-Electric Co.* declaratory relief in respect of rights under a Workmen's Compensation statute was refused upon the ground that declaratory judgment procedure did not supplant that of the Workmen's Compensation Board upon which the legislature of Kentucky had conferred exclusive jurisdiction in respect of industrial injuries.

It is urged by the appellees as a further limitation upon the exercise of declaratory judgment jurisdiction that it may not be used as a means for the review of administrative orders. Such a limitation is phrased by BORCHARD, *op. cit. supra*, 181, thus:

> . . . The declaratory action is not a substitute for a new trial, or an appeal from a former judgment deciding identical issues or issues which the court believes were passed upon.

In 16 American Jurisprudence 295-296, § 23, the limitation is more explicitly stated as follows:

> Questions already adjudicated by a court having jurisdiction of the subject matter and the parties cannot thereafter be the subject, between such parties and their privies, of an actual controversy within the meaning of this term in the Declaratory Judgments Act. The act is not intended to be used to elucidate or interpret judicial decrees or judgments already entered or to modify or declare rights thereunder. Hence, a declaratory judgment proceeding is not an appropriate method of obtaining the vacation of a judgment; and it would be entirely beyond the purpose and scope of the statute as well as contrary to fundamental principles for a court to attempt, in such a proceeding, to review and determine the validity of a judgment of a court of co-ordinate jurisdiction.

These statements are correct. But an examination of the authorities upon which they rest makes clear that they apply only where the prior judgment has been rendered by a judicial or at least quasi-judicial body. See: *Shearer* v. *Backer, supra; Back's Guardian* v. *Bardo*, 234 Ky. 211, 27 S. W. (2d) 960 (1930); *Ladner* v. *Siegel*, 294 Pa. 368, 144 Atl. 274 (1928); *Williamsport* v. *Williamsport Water Co.*, 300 Pa. 439, 150 Atl. 652 (1930); *Trustees of Columbia University* v. *Kalvin*, 226 App. Div. 775, 235 N. Y. Supp. 4 (1929). This is made clear also by a reading of the cases especially cited by the appellees in this particular connection (which include *Back's Guardian* v. *Bardo*, just mentioned). In *Back's Guardian* v. *Bardo* an action had been filed by an executor to sell certain real estate, to secure an order construing a will, and for partition of property, and a judgment had been rendered granting the relief prayed for. Subsequently, a declaratory judgment suit was brought by one of the parties. This suit propounded certain questions relating "to the construction of the will and the regularity of the partition proceedings in the prior action brought for that purpose, and to the proper distribution of the estate." Declaratory relief was refused upon the ground that "The purpose of the [Kentucky] Declaratory Judgment Act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been

properly adjudicated." But the prior adjudication had been by a validly constituted judicial tribunal, the Circuit Court of Campbell County, Kentucky. In *Ferree* v. *Ferree*, 273 Ky. 238, 115 S. W. (2d) 1055 (1938), *Back's Guardian* v. *Bardo* was followed in a ruling that a declaratory judgment proceeding was not to be availed of to pronounce void a divorce and alimony decree with incidental disposition of lands. But again the decree had been rendered by a validly constituted court exercising judicial powers, the Circuit Court of Hardin County, Kentucky. In *Grooms* v. *Grooms*, 225 Ky. 228, 7 S. W. (2d) 863 (1928), infants, through a next friend, attempted to attack by a declaratory judgment proceeding a prior judgment rendered in another court authorizing the sale of their property. The Court of Appeals of Kentucky, ruling that the previous judgment was voidable only, not void, held that it could not be collaterally attacked in a declaratory judgment proceeding. Here again the prior judgment had been rendered in a tribunal of competent jurisdiction exercising judicial power, the Greenup County Circuit Court. In *Kings County Trust Co.* v. *Melville*, 127 Misc. Rep. 374, 216 N. Y. Supp. 278 (1926), a declaration as to the validity of a lease was refused where the lease had already been authorized by the judgment of a competent court, to wit, the Supreme Court of Kings County, New York. In *Haan* v. *Haan*, more briefly referred to *supra*, a petition was filed for a declaration that the infant plaintiff was the illegitimate child of the defendant and as such entitled to support. The petition was refused because in New York proceedings relating to a child born out of wedlock were within the special jurisdiction of the Court of Special Sessions of the City of New York, where a determination had already been had, which determination, never having been reversed, was held *res judicata*.

In *Central High School Athletic Association* v. *City of Grand Rapids*, 274 Mich. 147, 264 N. W. 322 (1936), also cited by the appellees, the Supreme Court of Michigan affirmed the action of the Superior Court of Grand Rapids, in Chancery, which in the exercise of its discretion had declined to issue a declaratory judgment determining rights which had already been passed upon by a Board of Zoning Appeals. But in that case an ordinance, the competency of which was not questioned, had made the decision of this Board final so far as it involved discretion or the finding of facts; and the decision of the Board had involved the exercise of discretion. It is to be noted also that zoning boards have jurisdiction to determine a class of rights created by statute, rather than having source in the common law, and assigned for adjudication to such boards as special tribunals.

The foregoing discussion of cases thus indicates that declaratory relief may be refused upon any of the following five grounds: First, that the prior determination sought to be attacked by declaratory judgment is of a judicial or quasi-judicial nature; second, that the subject of dispute is pending in another action or is *res judicata;* third, that another remedy is adequate; fourth, that the rights and liabilities involved in the dispute and with which another tribunal is authorized to deal derive not from the common law but have statutory origin; fifth, that a "statutory court prescribed" for the determination of a particular type of case has been given by the sovereign exclusive jurisdiction.

I think it clear that the refusal of declaratory relief in the instant case cannot properly be based on any of the first four of such grounds. As to the first ground—that the prior determination is of a judicial or quasi-judicial nature—that does not exist in the instant case, for the Adjustment Board is not a tribunal which either in composition or procedure is of judicial or quasi-judicial nature; and it did not in the instant case render its award upon such a hearing as entitles the award to be considered as having been judicially arrived at. The Board is bi-partisan in composition, one-half of the members being selected and designated by and for the purpose of representing the carrier and paid by the carrier, and the other half by and for the purpose of representing the employees and paid by them. It was conceded by the appellees before the trial court—and the concession is a part of the record on appeal—that:

> . . . The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement. The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.
>
> The function of a court is to render a judgment between parties who are before it as litigants. Such a judgment has the effect of establishing the parties' present rights. With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary. It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.
>
> In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption.[7]
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> * * *
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> Both in personnel and in organization this Board departs somewhat from traditional *judicial* concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just and he will prevail.[8]

In the instant case, under the facts as pleaded and admitted by the motion to dismiss, when the dispute was before the Board there were no pleadings joining issue in the judicial sense of the term, but simply an ex parte submission by each side without reference to the submission of the other; no witnesses were called; no evidence was received except the ex parte submissions, if they may be called evidence, and these were without right of cross-examination; no record was made of the proceedings; the referee who cast the deciding vote in respect of the award considered no evidence except the ex parte submissions, and there was no argument before him, oral or written, by the parties or their representatives. The "findings" of the Board cannot properly be called findings of fact. The composition of the

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[7] R. 132-3.

[8] R. 86.

Board is in accordance with the statute, and the procedure is in accordance with the established practice of the Board as provided for by its rules.[9] The procedure does not satisfy the definition of quasi-judicial procedure as outlined by the Supreme Court of the United States in *Morgan* v. *United States*, 298 U. S. 468, 480 (1936):

> There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. . . .
>
> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

In respect of the second ground of refusal of declaratory relief: The subject of dispute in the instant case, to wit, the meaning of the collective bargaining agreement, is not pending in another action and is not *res judicata*. It is not pending in another action because the award has been made, and no enforcement proceeding commenced. It is not *res judicata* because the award was not an adjudication of the legal rights and liabilities arising under the agreement. This is not disputed in this appeal, and the discussion just concluded demonstrates it.

As to the existence of another adequate remedy, the third ground for refusing declaratory relief: Assuming that there is a remedy under the Railway Labor Act adequate to protect the rights of the appellant carrier, under Rule 57 of the Rules of Procedure for the District Courts of the United States "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." I discuss in topic IV (1) the question of adequacy of the remedy under the Railway Labor Act.

Concerning the fourth of the grounds above set forth as warranting refusal of declaratory relief: The rights and liabilities involved in the instant case do derive from the common law, that is to say, they are rights arising out of contract, not out of the Railway Labor Act. This is conceded in the instant case, as has been pointed out above, and is confirmed by the fact that before the Railway Labor Act of 1934 was passed, labor agreements of the character involved here were the subject of controversy in the courts under applicable principles of common law and equity and the courts took jurisdiction of their interpretation or enforcement. *McGregor* v. *Louisville & N. R. Co.*, 244 Ky. 696, 51 S. W. (2d) 953 (1932); *Panhandle & S. F. Ry. Co.* v. *Wilson*, 55 S. W. (2d) 216 (Tex. Civ. App., 1932); *Gregg* v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Rentschler* v. *Missouri*

[9] R. 40-43.

Pac. R. Co., 126 Neb. 493, 253 N. W. 694 (1934); *McCoy* v. *St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934); *George T. Ross Lodge* v. *Brotherhood of R. R. Trainmen*, 191 Minn. 373, 254 N. W. 590 (1934); *Gary* v. *Central of Georgia Ry. Co.*, 37 Ga. App. 744, 141 S. E. 819 (1928); *Long* v. *Baltimore & O. R. Co.*, 155 Md. 265, 141 Atl. 504 (1928).

The fifth ground said by the cases to warrant the refusal of declaratory relief where another procedure or tribunal has dealt or may deal with the case, to wit, that the "special statutory method" or "statutory court prescribed" has been given by the sovereign exclusive jurisdiction, remains for consideration. If Congress intended that the procedure for adjustment of disputes under the Railway Labor Act, including the statutory enforcement proceeding provided by Section 3(p), should be a "special statutory method," or if Congress intended the Adjustment Board to be an exclusive "statutory court prescribed," then the trial court was warranted in dismissing the appellant's complaint seeking declaratory relief.

IV

I am thus brought to a discussion of the question whether by some necessary implication of statutory language there is indicated a Congressional intent that the procedure before the Board and the statutory enforcement proceeding provided by the Railway Labor Act shall be exclusive. In this aspect of the case it is contended that: (1) the Labor Act provision of an enforcement proceeding in the District Courts implies that there should be no other access to courts for carriers for the reason that this statutory suit is adequate protection for them; (2) employees who fail to win an award by the Board are themselves disabled to have recourse to the courts; this implies that the carriers may not proceed in court except by defense to the statutory enforcement proceeding; (3) the provisions of the Labor Act imply an intention by Congress that the remedy under the Act shall be exclusive, for otherwise the employees will be deprived of procedural advantages afforded by the statutory remedy; (4) judicial construction of analagous language in the reparations provision of the Interstate Commerce Act and of the Packers and Stockyards Act requires the conclusion that the provisions of the Labor Act imply that the procedure and remedy thereunder are exclusive; (5) judicial construction of provisions for review of orders of the Securities and Exchange Commission, the Communications Commission, and the National Bituminous Coal Commission, requires the conclusion that the provisions of the Labor Act imply that the procedure and remedy thereunder are exclusive; and (6) it is a necessary implication of the provisions of the Labor Act that the remedy under Section 3(p) is exclusive, for otherwise recourse to the courts by carriers would increase litigation and would render the Act unworkable.

(1) The argument under this contention is that an award and order of the Adjustment Board impose no legal compulsion upon the carrier, so that until the statutory suit is brought and won by the employees the carrier's rights remain unaltered; therefore the carrier can afford to wait, and is adequately protected if and when the employees bring suit. I think this contention is not supportable. An award under the Labor Act may take the form not of an order for

the payment of money but of a finding that a claimant group is entitled to do certain work. Such a finding in effect serves notice on a carrier that it may, as the result of the statutory suit which the employees are empowered to bring, be required to change its operating practices, with the consequence not only of thus assigning the work described in the award to the claimant group but also of taking it away from others—since the claim on which such an award is based would not be made unless others were already performing the work in question. That is the type of award in the instant case. Thus the appellant is faced with a dilemma: On the one hand, if it disobeys the award and order and awaits the suit of the employees and loses that suit, it will then be obliged to pay the accumulated demands of the employees for the work which they in the meantime will not actually have done, together with the wages of the road engine crews of the Tenant Lines, who in the meantime have been performing the train movements in question. That the expense of the service of the road engine crews of the Tenant Lines in performing the train movements in question is ultimately borne by the appellant appears inferentially in the facts and is stated in the appellant's brief on appeal and not disputed by the appellees, and was admitted by the appellees in their third defense below.[10] In the mean-

[10] While it is not in terms alleged in the complaint that the expense of the services of the road engine crews of the Tenant Lines in performing the switching service involved in the case is ultimately borne by the appellant, this fact may be reasonably inferred from the allegations that the train movements in question in the case have been performed by the road engine crews of the Tenant Lines since the commencement of the operation of the Terminal in 1907 where, in the judgment of the managing officers of the appellant, efficiency and promptness in the operation of the Terminal is thereby promoted. Moreover, the brief of the appellant states (p. 62) that as a result of the award it is "faced with the alternative of either so readjusting its practices as to comply immediately with the award, irrespective of its legal correctness, which may involve a large increase in the expenses of operation, or, on the other hand, if it waits until suit is brought and then loses in court, it will have to pay back wages to the claimant employes for the work which it should have permitted them to perform, in addition to the wages which in the meanwhile it must pay to the other employes who are actually doing the work." And again, in further discussion of the dilemma in which the appellant under the facts finds itself, the appellant's brief (p. 65) states: "If it proceeds immediately to put into effect the award of the Board it must displace the persons whom it is presently employing. These persons, who are not treated by the Board as necessary parties in the proceeding before it and who cannot under the statute be forced into those proceedings, are entirely free to institute suit in the courts against the carrier on their own contract, and in such a suit the courts may sustain their right to do the work in dispute. If they do so, then they are of course entitled to payment during the period in which they were displaced through the carrier's compliance with the award." These statements are not denied in the appellees' brief.

In the third defense the appellees, as defendants below, stated: "The practice of the plaintiff, which gave rise to the dispute in question, was and is to permit and require the train crews of the Tenant Lines to use the said road engines in the moving of empty and loaded cars and trains of cars from place to place in the yards of the plaintiff, when such movement does not constitute a portion of any through train run, but does constitute a switching service in the said yards.

"The defendants say further in this connection that at present, and for a long period of time in the past, the plaintiff and the Tenant Lines have recognized that the services described above are properly services of and for the plaintiff, and which it could be required to render. It has been, and now is, the practice to keep a strict accounting between the parties of the amount and value of such services, and periodically the plaintiff is required to pay, and does pay to the Tenant Lines, sums equal to the reasonable value of said services."

time also the appellant will have subjected itself to the risk of strike by its own employees. For it is contended by the appellant and not disputed by the appellees in their brief on appeal, and it was stated by the appellees in the trial court,[11] that the primary sanction of an award in favor of employees is not the statutory enforcement proceeding provided in the Labor Act, but the economic bargaining power of the employees. On the other hand, if the appellant obeys the award and changes its operating practices, it subjects itself to the danger of suit for breach of contract by the road engine crews of the Tenant Lines, who will thus have been deprived of the work which they have been performing. So long as the appellees do not bring the statutory suit this dilemma will continue unsolved—in the absence of a declaratory judgment. Nothing but the latter, unless the employees sue—and the appellant has no means of compelling them to sue—can determine the rights of the parties under the agreement of February 1, 1923, and thus enable the appellant, if necessary, to make present readjustments of its operating arangements so as to fulfill its obligations to the appellees at less expense than by incurring the penalty payments which they are now demanding. Therefore the argument that the statutory remedy is exclusive by implication because it adequately protects the carrier's interest is not sound. On the contrary of the carrier's being given by the statute the protection to which it is justly entitled, it is exposed to consequences which it is the purpose of legal institutions to avoid, to wit, coercion without such legal recourse as will afford a reasonably prompt judicial determination of rights and relief from the hazards of conflicting demands.

The appellees rely upon *Federal Trade Commission* v. *Claire Furnace Company*, 274 U. S. 160 (1927), and *Federal Trade Commission* v. *Maynard Coal Company*, 57 App. D. C. 297, 22 F. (2d) 873 (1927). In the first of these cases the Federal Trade Commission had served a notice on companies in the coal, steel, and related industries ordering them to furnish the Commission with monthly reports concerning costs of production and the like. The Commission was acting under Sections 6 and 9 of the Federal Trade Commission Act of September 26, 1914 (38 Stat. 717, 721, 722), empowering it to gather and compile information concerning companies engaged in interstate commerce and to require the filing of reports or answers to specific questions, and giving the Commission power to require the production of documentary evidence. The companies disregarded the

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[11] It was stated in the Memorandum Brief filed by the appellees in the trial court and made a part of the record on appeal that: "The review process adopted was not the result of a haphazard selection, but forms an integral part of the whole Congressional plan. That plan, as we have seen, has its cardinal principal that the parties should be given every inducement to agree upon a practicable settlement of their differences. Thus, even if an order has been made by the Board, that Board has no authority to enforce it. No *legal* compulsion is placed upon a carrier to comply. The orders of the Board find their primary sanction in the collective economic bargaining power of the employees. Suit may be brought at any time within two years, thus affording ample opportunity for adjustment by agreement." R. 102-3.

To the effect that the economic bargaining power of the employees is the primary sanction of the awards of the Board see also "The National Railroad Adjustment Board," by William H. Spencer, University of Chicago Press, 1938, pages 52-59 inclusive, where the author discusses the nature and enforcement of awards. See in particular page 56.

orders and filed in a United States District Court (the then Supreme Court of the District of Columbia, now the District Court of the United States for the District of Columbia) a bill alleging that the Commission had exceeded its powers and praying for an injunction against the effectiveness of the orders. The Federal Trade Commission Act in Section 10 (38 Stat. 723) provided penalties for failure to file the reports, but the penalties were not effective until thirty days after notice of default, which in this case had not been given. The only method provided by the statute for enforcement of the Commission's orders was, under Section 9, the institution by the Attorney General upon the request of the Commission of a mandamus action, and, under Section 10, the institution under the direction of the Attorney General of a proceeding in a District Court to recover the penalties. The District Court granted the injunction and this was affirmed by the Circuit Court of Appeals (the then Court of Appeals for the District of Columbia, now the United States Court of Appeals for the District of Columbia). On appeal by the Commission to the Supreme Court of the United States the lower courts were reversed. The Supreme Court held that there was nothing that the Commission could have done to secure enforcement of the challenged orders, except to request the Attorney General to institute proceedings for mandamus or to supply him with the necessary facts for an action to recover the penalties, and that therefore until the Attorney General acted the companies could not suffer, and that when he did act they would then have full opportunity to contest the legality of any prejudicial proceeding against them, and that that right to contest was adequate and that hence they were not in a position to seek relief by injunction. In *Federal Trade Commission* v. *Maynard Coal Company* a similar question was presented, except that in that case the thirty-day notice had been served and the penalties were therefore running, although again no action had been taken by the Attorney General. The ruling followed the decision in the Supreme Court just discussed. But these two cases are not relevant to the instant situation. The orders involved were mere orders to file reports. They were made by the Federal Trade Commission acting as an arm of Congress to secure information for legislative purposes. They involved no contract rights and no adjustment of a dispute arising out of contract rights as does the instant case. Also, the orders were enforceable only upon the action of a governmental authority, to wit, the Attorney General, rather than being left, as is an award and order of the Adjustment Board, to the sanction of the economic bargaining power of an adversely interested private party, or to enforcement proceedings optional to such a party.

(2) Under this topic it is said by the appellees that one who has elected to pursue an administrative remedy is bound by the result, and for this reason and also because the statutory enforcement action provided by the Labor Act is available only to one who wins an award, the employees who fail to win an award are without further recourse, that is, may not themselves invoke the jurisdiction of the courts. Hence, argue the appellees, it is implied that the carriers may not proceed in court except by defense to the statutory enforcement proceeding. Assuming, *arguendo*, that the position taken by the ap-

pellees—that employees who fail to win an award before the Board cannot have access to the courts upon the collective bargaining contract itself out of which a dispute grows—is correct, it is I think irrelevant to the further question whether or not the procedure before the Board and the statutory enforcement proceeding afforded by the Labor Act are exclusive so far as a losing carrier is concerned. It would seem more logical to conclude that it could hardly have been the intention of Congress to exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the Board. Indeed the argument that the carrier cannot have recourse to the courts because employees losing before the Board cannot sue either under the Act or at all begs the very question in issue, to wit, whether the procedure provided for by the Labor Act is exclusive.

(3) The contention that the language of the Labor Act implies an intent by Congress that the statutory enforcement proceeding provided for therein shall be exclusive, for otherwise the employees would be deprived of procedural advantages afforded by the statutory remedy, is based upon those portions of Section 3(p) of the Act having to do with the selection by the employees of a forum, the allowance to them of attorney's fees and costs, and of a two-year period of time within which they may commence the statutory suit. The argument here made would conceivably be appropriate before Congress against the enactment of a declaratory judgment statute, but it has no more relevance to the instant case than to any other case. For it is a necessary consequence of the declaratory judgment procedure that it shall deprive a defendant of special advantages that he might have obtained by acting first and suing as plaintiff. It is the purpose of the Declaratory Judgments Act to enable a plaintiff to relieve himself of embarrassments arising from the failure of his opponent to make the declaratory judgment plaintiff a defendant in another proceeding. In any declaratory judgment suit brought to determine rights not yet sued upon by the defendant as plaintiff, the declaratory judgment suit plaintiff may choose to sue in the residence of the defendant, who might himself, had he brought action as plaintiff, have chosen another forum. In respect of attorney's fees and costs—many contracts provide for these in the event of suit by one of the parties. But the opposite party can cut off this advantage if, in a declaratory judgment action first brought to determine the rights and duties under such a contract, he obtains a determination that he has no duty. So in respect of the statute of limitations, a potential defendant occupying a situation which may be the proper subject of a declaratory judgment action may, by commencing such an action prior to the bringing of suit by the potential plaintiff upon his claimed cause of action, cut down the statute of limitations applicable thereto. Thus it is apparent that the objection made in this aspect of the case to the declaratory judgment procedure is an objection to that procedure generally. If it applies here it must apply generally. If it does not apply generally, it cannot be urged here unless the statutory remedy under the Labor Act, including its special venue, attorney's fees and costs, and statute of limitations provisions, is exclusive—which is the very question in issue. If the remedy is exclusive there is no need to rely upon the objection. If it is not exclusive, the objection fails.

(4) Equal justice requires that similar terms of statutes enacted for like purposes should have like interpretations. In respect of proceedings in courts to enforce reparations orders made in favor of shippers and against carriers under Section 16(1), Section 16(2) of the Interstate Commerce Act (34 Stat. 590 (1906), as amended by 36 Stat. 554 (1910), 36 Stat. 1167 (1911), and 41 Stat. 491 (1920)) provides:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

There is a similarly worded provision in the Packers and Stockyards Act, Section 309(f) (42 Stat. 166 (1921)). The appellees urge that under judicial interpretation of these statutes the enforcement proceedings provided for are exclusive, and the appellees say that Section 3(p) of the Labor Act is similarly worded and should be similarly construed.

I do not read the cases as holding that the reparations remedy of the Interstate Commerce and Packers and Stockyards Acts is exclusive in the sense in which that term is being used in the instant case. In *Brady* v. *Interstate Commerce Commission*, 43 F. (2d) 847 (N. D. W. Va. 1930), affirmed 283 U. S. 804 (1931), a shipper attempted to obtain an order setting aside and correcting findings made by the Commission in a reparations suit and requiring the Commission to make a supplemental order on the basis of the corrected findings. The action was brought in a United States District Court, under 36 Stat. 539 (1910), as amended by 38 Stat. 219 (1913), as one "to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission," and a special court of three judges was asked for under the Urgent Deficiencies Act (38 Stat. 220 (1913)). But it was held that the action must fail, first because it was not brought to set aside an order of the Commission but only to correct alleged errors in the findings on which the order was based, and second because a reparations order of the Commission was not within the class of orders which Congress intended might be enjoined under the Urgent Deficiencies Act in a three-judge court. *Baltimore & O. R. Co.* v. *United States*, 87 F. (2d) 605 (C. C. A. 3d, 1937), also held that a three-judge District Court has no jurisdiction to enjoin a reparations order of the Interstate Commerce Commission. But these two cases, in holding that the remedy of injunction by a three-judge court is not available to a shipper against a reparations order of the Commission, hold nothing concerning the exclusiveness of the reparations remedy so far as other recourse to the courts by either shipper or carrier is concerned. In *Baltimore & Ohio R. Co.* v. *Brady*,

288 U. S. 448 (1933), relied upon by the appellees, an action was brought by a shipper against a carrier in a United States District Court in consequence of the failure of the carrier to comply with a reparations order of the Interstate Commerce Commission for damages found to have been sustained by reason of discrimination by the carrier in furnishing cars for the transportation of coal from the shipper's mine. The action was brought under Section 16(2) of the Interstate Commerce Act to enforce the Commission's order made under Section 16(1). In this suit the shipper sought and obtained judgment for a sum greater than the reparations award of the Commission. This judgment was affirmed in the Circuit Court of Appeals, but on certiorari to the Supreme Court there was a reversal. The Supreme Court pointed out that while Section 3 (24 Stat. 380 (1887)) of the Interstate Commerce Act makes it unlawful for a carrier to subject any person or traffic to unreasonable disadvantage, and while Section 8 (24 Stat. 382 (1887)) imposes upon carriers liability for the full amount of damage sustained in consequence of a violation of the Act, and while under Section 9 (24 Stat. 382 (1887)) a person so injured may either make a complaint to the Commission (under Section 16(1)) or bring suit for damages in a District Court, such a person, because of the further provisions of Section 9, "shall not have the right to pursue both remedies, and must select which method he will adopt." (288 U. S. at 456) And the Court held that the shipper, having elected to seek relief through the Commission under Section 16(1) and (2) was not entitled to recover more than the amount of the award made under that section. *Terminal Warehouse Co.* v. *Penna. R. Co.*, 297 U. S. 500 (1936), and *Western New York & Penn. R. Co.* v. *Penn. Refining Co.*, 137 Fed. 343 (C. C. A. 3d, 1905), *affirmed*, 208 U. S. 208 (1908), also cited by the appellees, reflect the same rule as that laid down in the case just discussed. But these three cases rest upon the provisions of Section 9 of the Interstate Commerce Act which confers an election of remedies upon the shipper. They hold nothing concerning the exclusiveness of the statutory remedy so far as the carrier is concerned. *Minds* v. *Pennsylvania R. Co.*, 237 Fed. 267, 270 (E. D. Penn. 1916), *affirmed*, 244 Fed. 53 (C. C. A. 3d, 1917), and 250 U. S. 368 (1919), cited by the appellees for the statement therein contained that "the complainant, being a volunteer, is concluded by what the [Interstate Commerce] Commission does,"—from which the appellees draw the inference that if the shipper fails to win an award he has no recourse to the courts—is but dictum so far as that statement is concerned, because on the facts of the case the shipper prevailed. No cases are cited and I know of none which construe the reparations provision of the Packers and Stockyards Act in respect of exclusiveness.

But even assuming the existence of a judicial interpretation of the reparations provisions of the Interstate Commerce Act and the Packers and Stockyards Act to the effect that the reparations remedy is exclusive, in the sense that it forbids other recourse to the courts by either shipper or carrier, such an interpretation would, because of dissimilarity between the provisions and purposes of those two acts on the one hand and of the Railway Labor Act on the other, have no persuasive value in the instant case. The Labor Act contains no

section expressly requiring an election of remedies. Again, the reparations remedy of the Interstate Commerce Act and the Packers and Stockyards Act is made available only in case of non-compliance of the carrier "with an order for the payment of money," whereas the remedy provided by Section 3(p) of the Labor Act is available in respect of any order of the Adjustment Board, including a direction to a carrier, as in the instant case, in respect of its operating practices. As has been pointed out in part (1) of this topic IV, the award in the instant case in effect says to the appellant that it must henceforth permit certain men, to wit, the appellees, to perform certain train movements, and thereby not allow other men to do that work. A legal proceeding to compel obedience to an award of this kind is much different in its incidents and consequences from a suit to recover money; and the grounds on which it might be held that a statutory action to recover money is by implication exclusive of all other forms of judicial relief, would have no necessary relevance to the question whether or not a statutory proceeding to enforce a claim to do certain work is exclusive. Still further, an interpretation of exclusiveness in the reparations remedy of the Interstate Commerce Act and the Packers and Stockyards Act would lack persuasive value in the instant case because the rights involved are different from those involved under such Acts. In the instant case the rights are common law rights arising out of a contract; under each of the other two Acts the rights are of a statutory character—the right to be charged in accordance with a schedule of rates—the right not to be made the subject of unreasonable preferences or prejudices. In respect of rights so created and assigned to the protection of a given tribunal, it might well be held that a special remedy provided by statute for enforcement of the rights was exclusive. Such a conclusion does not follow in the instant situation where the Adjustment Board has no authority to make a determination of contract rights as such, but only to adjust disputes arising out of the interpretation or application of collective bargaining agreements. Still further, the assumed judicial interpretation of exclusiveness in the reparations remedy of the Interstate Commerce and Packers and Stockyards Acts would not be persuasive in the instant case for the reason that the proceeding before the Adjustment Board differs vitally in nature from that before the Interstate Commerce Commission and the Department of Agriculture. The proceeding before these bodies is quasi-judicial in nature. It has been demonstrated above that this is not the case in respect of the Adjustment Board proceeding. I conclude that the rule that similar terms of statutes enacted for like purposes should receive like interpretation is inapplicable to the statutes compared in the instant case, "because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different." *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. 321, 330 (C. C. A. 8th, 1907), *certiorari denied*, 209 U. S. 544 (1908).

(5) The judicial decisions in respect of review of orders of the Securities and Exchange Commission, the Federal Communications Commission, and the National Bituminous Coal Commission cited by the appellees for the proposition that where a statute establishing an administrative tribunal provides an adequate method of review in the courts for its orders, such method is exclusive, and urged by the appellees as requiring the conclusion, by parity of reasoning, that

the provisions of the Labor Act imply that the statutory enforcement proceeding thereunder is exclusive, are *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441 (C. C. A. 2d, 1937); *Sykes* v. *Jenny Wren Co.*, 64 App. D. C. 379, 78 F. (2d) 729 (1935), *certiorari denied*, 296 U. S. 624 (1935); *Monocacy Broadcasting Co.* v. *Prall*, 67 App. D. C. 176, 90 F. (2d) 421 (1937); and *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 69 App. D. C. 333, 101 F. (2d) 426 (1938), *affirmed*, 306 U. S. 56 (1939). In *Securities and Exchange Commission* v. *Andrews* the Commission had filed a bill of complaint in a United States District Court under Section 21(e) of the Securities and Exchange Act of 1934 (48 Stat. 881, 899), to enjoin the defendants—Andrews and others—from violating the provisions of Section 9 (48 Stat. 889) with respect to stock of Dictograph Products Company. While the suit was pending upon the bill, answer, and the Commission's motion for a preliminary injunction, the Commission made an order pursuant to Section 21(a) (48 Stat. 899) of the Act for an investigation to determine whether to suspend unlisted trading privileges in Dictograph stock pursuant to Section 12(f) (48 Stat. 892), as amended (49 Stat. 1375 (1936)); and a subpoena duces tecum was issued by a Commission investigating officer directing the Company to appear before him. Thereupon the defendants filed a cross-bill of complaint to enjoin the Commission and its agents "from all activity with respect to" Dictograph stock. The trial judge dismissed the cross-bill for want of jurisdiction and want of equity. The Circuit Court of Appeals affirmed on the ground that the trial court was without jurisdiction to entertain the cross-bill, the theory of the decision being that a suit against the Commission, an administrative agency of the United States, can be maintained only in the courts and upon the terms specified in the statute. The court pointed out that Section 25(a) (48 Stat. 901) of the Securities and Exchange Act provides that "any person aggrieved by an order issued by the Commission . . . may obtain a review of such order in the Circuit Court of Appeals."[12] It held that the order to appear before the investigator was interlocutory and not reviewable under Section 25, but that even if it were reviewable, review could be had only in the Circuit Court of Appeals. But the case is not apposite, for the instant case is not a suit against the National Railroad Adjustment Board. Moreover, the statutory appellate procedure afforded under the Securities and Exchange Act is available to both parties. Still further, the Securities and Exchange Commission is a governmental body whose hearings are of a quasi-judicial nature. Similar distinctions are to be taken in respect of *Sykes* v. *Jenny Wren Co.*, *Monocacy Broadcasting Co.* v. *Prall*, and *Utah Fuel Co.* v. *National Bituminous Coal Commission*.

(6) In respect of the last argument in this aspect of the case—that it is a necessary implication of the provisions of the Railway Labor Act that the remedy under Section 3(p) is exclusive for otherwise recourse to the courts by a carrier would increase litigation and

[12] Section 25(a) provides: "Any person aggrieved by an order issued by the Commission . . . to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

would render the Act unworkable: It is not to be doubted that if there is access to the courts for declaratory relief, carriers which, in view of a contract entered into with employees, regard an Adjustment Board award as unjust, will seek relief in the courts where the statutory suit is not promptly brought by the employees. And it is not to be doubted that this will in some degree lessen the effectiveness of awards which might otherwise be enforceable through the sanction of economic bargaining power. But the argument is one to Congressional intent. It is urged that the Adjustment Board is adapted to the settlement of disputes growing out of collective bargaining agreements between carriers and their employees, and that it has performed its function of settling such disputes with a high degree of success. It is asserted that an interpretation of a statute which must lead to weakening the success of an agency created by it is inadmissible if the statute is susceptible of another interpretation by which such a consequence can be avoided, for Congress will not be presumed to have intended a nugatory thing. 59 C. J. 961-4, § 571. But it is also cardinal that Congress will not be presumed to have intended a mischief or injustice. 2 Sutherland, Statutory Construction (2d ed. 1904) §§ 488-90; 25 R. C. L. 1022, § 258. And if a choice must be made between an interpretation which would lessen the effectiveness of a statute and one which would result in unfairness, the former ought to prevail, for it ought not to be taken that Congress would intend to gain an end at the price of fairness. Such I think would be the consequence of the interpretation of the statute urged here by the appellees. For the consequence of the conclusion that recourse to the courts for a determination of the meaning of a collective bargaining contract between a carrier and its employees was not intended is that Congress did intend to set up a system of compulsory arbitration whereunder either party to a dispute arising out of a collective bargaining agreement could force the other into a proceeding before the Adjustment Board, and whereunder the award, when made, would be immunized against judicial relief unless the employees, having won, elected to bring a statutory enforcement proceeding instead of relying upon their economic bargaining power as the primary sanction of the award. And the further consequence is that Congress intended to give the Board in effect final power to determine contract obligations—since the disputes which it is to consider are of a legal nature "growing out of the interpretation or the application of agreements" (Section 2)—notwithstanding the fact that the Board is concededly an adjustment board rather than one to adjudicate legal rights and obligations, and notwithstanding that if the Board, rather than giving effect to the actual legal obligations of a contract, should disregard them, the award would in effect abolish actual obligations and substitute new ones, thus reducing collective bargaining agreements to virtual nullity—a result as unfortunate for employees as for carriers. Thus to hold that the statutory remedy must be construed as excluding other forms of judicial relief in order to make the provisions of the Railway Labor Act workable would require giving a definition to workable which Congress cannot be presumed to have intended.

I think it is not warranted to hold that the Railway Labor Act provisions necessarily imply an intent to deny right of access to

the courts except in the enforcement proceeding of Section 3(p) because if not thus interpreted the effect will be, as the appellees urge, to increase litigation. The establishment of collective bargaining has resulted in the execution of a very large number of contracts between carriers and their employees governing rates of pay, rules and working conditions. These contracts, being the source of rights and obligations of importance to the parties, will inevitably lead to litigation. This Congress must be taken to have understood.

I thus conclude that by no necessary implication of statutory language is there indicated a Congressional intent that either the procedure before the Board or the statutory enforcement proceeding provided by the Railway Labor Act of 1934 shall be exclusive. *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630 (1941), although not directly in point on the facts for the reason that therein there had not been, as in the instant case, recourse to the Adjustment Board and an award and order, nevertheless interprets the Labor Act in a manner which I think tends to confirm the conclusion I reach. In that case the petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against the respondent Railroad Company, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the Company. Originally commenced in the state courts, the action was ultimately removed to a United States District Court, which rendered judgment against the Company; but this was reversed by the Circuit Court of Appeals. *Inter alia*, the Company contended that the judgment in its favor should be sustained because both the District Court and the Circuit Court of Appeals "erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act . . .." But the Supreme Court held otherwise. It said:

> . . . But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to § 153(i) [Section 3(i), 48 Stat. 1191], which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." . . . It is to be noted that the section pointed out, § 153(i), as amended in 1934, provides no more than that disputes "may be referred . . . to the . . . Adjustment Board . . . ." It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a "dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . . ." This difference in language, substituting "may" for "shall", was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. . . . [312 U. S. at 634-6]

The appellees cite *Railroad Yardmasters of North America, Inc.* v. *Pittsburgh & Lake Erie Railroad Company*, 39 Fed. Supp. 876 (D. C. N. D. Ohio, 1940). In that case the individual defendants had obtained favorable awards from the National Railroad Adjustment Board, Fourth Division, granting them a higher status on a yardmasters' seniority roster in the East Youngstown yard. Compliance with these awards by the Railroad would place other employees whose names appeared on the same roster in a less favorable seniority position. The Railroad Yardmasters of North America, Inc., on behalf of employees whose seniority rights would be thus adversely affected, filed a complaint for a preliminary injunction enjoining all of the defendants from putting the award into effect, and prayed upon final hearing a permanent injunction. The complaint asserted that in making the awards the Board acted without jurisdiction and that its proceedings were in violation of the statutes establishing it and governing its procedure. The answers of the individual defendants asserted that the court had no jurisdiction, and on this ground the court dismissed the complaint. The theory of the decision was that the enforcement proceeding provided for by Section 3(p) of the Railway Labor Act was exclusive, and that no indirect review or collateral attack of the Board's awards, such as was sought in the complaint, was permissible. This case, although it involves a form of action different from that in the instant case, is nevertheless contrary, so far as its *ratio decidendi* is concerned, to the position I take herein. But I think it not persuasive. On the contrary, in my opinion, it illustrates the unfortunate results attendant upon a conclusion that the Railway Labor Act provides an exclusive remedy for determining disputes arising under agreements between carriers and their employees. If the Railroad was willing to comply with the awards—which it apparently was, in view of the injunction suit—there would be no necessity for the successful seniority right claimants to institute an enforcement proceeding under Section 3(p), and yet the Railroad's compliance with the awards might diminish or destroy the rights of other employees, and this whether or not they were given notice of the proceedings before the Board or an opportunity to be heard. And since under the decision of the District Court they are forbidden access to the courts, except in the event of an enforcement proceeding, they are effectually denied all judicial determination of their rights.

V

Is there some implication of legislative history to the effect that exercise of declaratory judgment jurisdiction of the United States District Courts is forbidden in such cases as the instant case because the procedure before the Board and the statutory remedy provided for in the Railway Labor Act of 1934 are exclusive? I find none. The Reports of the House and Senate Committees recommending the bill which became that Act (H. R. Rep. No. 1944; Sen. Rep. No. 1065, 73rd Cong., 2d Sess., 1934) show it to be an outgrowth of the Railway Labor Act of May 20, 1926 (44 Stat. 577) and indicate that it was designed *inter alia* to correct two defects in that Act: one, the pos-

sibility left open by the language of the 1926 Act that adjustment boards would cover only a part of the national railroad system; the other, the contingency of a deadlock. The House Committee Report stated:

> The second [13] major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as "grievances", which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions. The present Railway Labor Act provides for the establishment of boards of adjustment by agreement. In many instances, however, the carriers and the employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers shall be equally represented on the board.
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> Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties. The provisions as to the national board of adjustment are as follows:
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> (*g*) If any division of the Board should deadlock on a dispute, then the representatives on the Board will endeavor to select a neutral or impartial person; and if they are unable to agree upon the selection of such neutral person, then the United States Board of Mediation will appoint a neutral person. The dispute will then be again considered and a majority decision reached.

While the foregoing language makes clear that the Committee regarded the compromise or adjustment, through the means provided, of minor disputes known as "grievances," arising from the interpretation of collective bargaining agreements between carriers and their employees, as desirable, it neither expresses nor implies disparagement of the right of judicial determination of legal issues. The Supreme Court in *Pennsylvania R. R.* v. *United States Railroad Labor Board*, 261 U. S. 72, 84 (1923), said of an earlier adjustment board (the adjustment board established under title III of the Transportation Act of 1920):

> But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees, or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to

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[13] The Report states the purposes of the bill to be: "1. To prohibit any interference with freedom of association among employees and to prevent the denial of the right of employees to join a labor organization as a condition precedent to their employment. 2. To provide for the complete independence of carriers and of employees in regard to self-organization in order to carry out the purposes of this act. 3. To provide for the prompt and orderly settlement of all disputes growing out of grievances and out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, so as to avoid any interruption of commerce or of the proper operation of any carrier engaged therein."

coöperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. . . .

Undoubtedly the function of the Board in facilitating compromise of disputes is useful and important, but it is not to be implied from an indication by the Committee that settlements are desirable or from the fact that Congress set up an agency of adjustment, that it was the intention of Congress to forbid the adjudication of legal rights by the courts.

No intention to affect or change the provisions defining the nature and functions of the National Railroad Adjustment Board appears in the legislative history. Under the 1934 Act a group of carriers and their employees may still establish a separate board, and if they do so, the National Board has no function in respect of disputes which are subject to the separate board. The language of the 1934 Act concerning the functions of the National Board is substantially that of the 1926 Act except that the latter said that disputes "shall be referred" whereas the 1934 Act says "may be referred" to the Board. I think it clear from the parallelism between the two Acts that the function and place of the 1934 Board were intended by Congress to be identical with the function and place of the adjustment boards under the 1926 Act. This is confirmed by the statement of the Supreme Court quoted *supra* from *Moore* v. *Illinois Central Railroad Company*. And there has been no suggestion in the instant case that there was any intention by Congress under the 1926 Act to substitute adjustment board proceedings for those of the courts, that is, to deny to parties to adjustment proceedings access to the courts for the determination of their legal rights under collective bargaining agreements out of which disputes have arisen.

Not only do I find no indication in the legislative history in respect of the 1934 Act as a whole of an intention to make the Adjustment Board and its procedure exclusive, but also I find no legislative history indicating that Congress intended that the special statutory suit made available under the 1934 Act to employees who have succeeded in obtaining a favorable award, was intended to be an exclusive remedy and thus to cut off access to the courts for the carriers for declaratory or other relief. There is no reference in the Committee Reports on the 1934 Act, or in the discussion on the floor, to the statutory action provided for by Section 3(p); and neither of the Reports mentions Section 3(p) as introducing any change over the 1926 Act. And yet if that section forbids access to the courts in other forms of action, the 1934 Act represents a serious change over the 1926 Act. It would seem likely that, if it had been the intention of the Committees to accomplish such a change, they would have said so.

VI

It is a settled rule of statutory construction that courts will if possible avoid such an interpretation of a statute as will raise serious doubts as to its constitutionality. I think the construction which the appellees put upon the Railway Labor Act would threaten its validity. For the position of the appellees can hardly be limited to

declaratory relief. The argument is that Congress has made the adjustment procedure and statutory enforcement proceeding, in the event of an award, exclusive. The consequence must then be that there is no access to the courts whatever either for damages or by way of injunction or for declaratory relief. The last is but remedial. Declaratory judgments statutes add nothing to the substantive jurisdiction of the Federal courts. *Aetna Life Ins. Co.* v. *Haworth* and *Aetna Casualty & Surety Co.* v. *Quarles*, both cited *supra*. There is of course no constitutional right to a declaratory judgment as such, but if the Labor Act is construed to bar all judicial relief to the carrier party to a collective bargaining agreement this would deny the carrier due process of law, since deprivation of remedy in the courts would destroy the character of collective bargaining agreements as contracts for the carrier. For the reasons stated in topic IV (1), the remedy afforded the carrier by way of defense to the enforcement proceeding available to employees only under Section 3(p) is in effect no protection. "Without the remedy"—meaning an adequate remedy—"the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable." *Von Hoffman* v. *Quincy*, 4 Wall. 535, 552 (U. S. 1866). Therefore a contract right will have been taken without due process of law.

It is elementary constitutional law that when the legislature provides a remedy but interposes such conditions precedent to its availability that the hazards and burdens incident to its use can reasonably be expected to deter resort to it, the courts will provide relief in an appropriate proceeding even though the statutory remedy is plainly intended to be exclusive. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). In the instant case the power to institute judicial proceedings under the remedy provided in Section 3(p) is placed solely in the hands of the other party to the controversy, to wit, the appellees. The appellant is powerless under the statute to take action itself to set in motion the judicial machinery said to be available to it for relief. And in the interval it is subjected to hazards so great and cumulative that, from the judicial notice which will be taken of what is to be expected from reasonable persons, it is apparent that it will prefer not to wait but to yield. Under such circumstances the judicial remedy apparently held out by the language of the statute is illusory. It is denied by the actualities of the situation of the parties.

A further constitutional threat to the statute through the appellees' construction of the Labor Act is this: If the hazards of waiting for employees to bring the statutory action are so serious and deterrent that a carrier has no choice in actuality but to obey the award of the Board, then the result in effect is to give the Board final authority to determine contract rights. That is an exercise of judicial power. There can be no valid delegation of governmental power to non-governmental agencies. *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936). The Adjustment Board, consisting of bi-partisan groups paid by and set up to represent the employees and carriers respectively, is not a governmental agency.

In summary, I am of the opinion that: The appellant's complaint states a case appropriate for the exercise of declaratory judgment jurisdiction of a United States District Court. No expression of Congressional intent, no principle or policy of law, no necessary implication of statutory language or of legislative history, forbids exercise of the jurisdiction under the circumstances of the instant case. Under the due process clause of the Fifth Amendment the courts are open to all who present a controversy which is the proper subject of judicial action. No impediment to the appellant's action appearing, the trial court should not have dismissed the complaint.

[fol. 382] Tuesday, November 18th, A. D. 1941.

No. 7465, October Term, 1941

THE WASHINGTON TERMINAL COMPANY, Appellant,

vs.

F. E. BOSWELL et al.

Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. Justice Rutledge.

November 18, 1941.

Dissenting opinion by Mr. Justice Stephens.

[fol. 383] United States Court of Appeals for the District of Columbia. Filed Jan. 30, 1942. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1939

No. 7465

THE WASHINGTON TERMINAL COMPANY, Appellant,

vs.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, et al.

DESIGNATION OF RECORD

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.

3. Opinion of the Court.
4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

John Dickinson, Counsel for The Washington Terminal Company.

[fol. 384] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI AND CERTIFYING TO THE ATTORNEY GENERAL OF THE UNITED STATES THAT THE CONSTITUTIONALITY OF THE RAILWAY LABOR ACT IS DRAWN IN QUESTION—March 30, 1942

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

In view of the Act of August 24, 1937 (50 Stat. 751), the Court hereby certifies to the Attorney General of the United States that the constitutionality of the Railway Labor Act is drawn in question in this cause.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
FEB 18 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~964~~ 28

THE WASHINGTON TERMINAL COMPANY,
Petitioner,

v.

J. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, et al.

PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIBER,
1740 BROAD ST. STATION BLDG.,
PHILADELPHIA, PA.
Counsel for Petitioner.

FEBRUARY 18, 1942.

KAY, LANE & SCOTT, PRS., PHILADELPHIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941. No. .

The Washington Terminal Company, Petitioner

v.

F. E. Boswell, E. R. Burkhead, R. R. Bridges, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Washington Terminal Company prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above cause on November 18, 1941 (R. 382), which affirmed the judgment of the District Court of the United States for the District of Columbia dismissing the complaint herein.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 331-48), and the dissenting opinion of Mr. Justice Stephens (R. 348-81), were handed down on November 18, 1941, and are reported in 124 F. (2d) 235.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on November 18, 1941 (R. 382). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347, 43 Stat. 938).

STATUTES INVOLVED.

This suit is brought under and in accordance with the Declaratory Judgments Act of June 14, 1934, c. 512, 48 Stat. 955, as amended. The pertinent provisions thereof are as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or

could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Certain provisions of the Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151 *et seq.*) are involved because they have been relied on by respondents in the courts below. The portions of the Act principally concerned are Sections 3 First (i) and (p), which provide as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the car-

rier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

QUESTIONS PRESENTED.

1. Whether or not Section 3 First (p) of the Railway Labor Act is to be construed, in the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of

jurisdiction to entertain a declaratory judgment proceeding, where such a proceeding would otherwise be appropriate.

2. Whether or not Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes.

3. Whether or not the conclusion of the court below, to the effect that the unilateral submission of a dispute by employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the court to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Railway Labor Act, gives to the Railway Labor Act a construction which is unreasonable and is inconsistent with the construction placed upon it by this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941), wherein it was held that the procedure by the Railway Labor Act for the adjustment of such disputes was not intended to be exclusive.

4. Whether or not, in the face of Article 3, Section 1, of the Constitution of the United States, and of the due process clause of the Fifth Amendment to the Constitution, the Railway Labor Act, and more specifically Section 3 First (p) thereof, is to be given a construction which would have the effect of making the awards of a non-judicial body, like the National Railroad Adjustment Board, to all practical purposes final save at the option of the employes, and which would have the effect of closing the doors of the courts to railroad employers with the result of subjecting them to economic pressure in order to compel them to comply with such awards.

GROUNDS FOR APPLYING FOR WRIT.

1. It is a matter of public importance that the Railway Labor Act of 1934, which has been erroneously and unreasonably construed by the Court of Appeals below, should be properly and reasonably construed so that it will not close the doors of the courts against the employer-party to a collective agreement, while the employes can exert economic coercion against him to compel him to give to the agreement such meaning as the employes wish it to have.

2. The decision of the Court of Appeals below is in conflict with the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941), in construing the system of "ad-

justment" established by the Railway Labor Act as amounting in practical operation to a scheme of compulsory arbitration with power of final and conclusive decision vested in the Adjustment Board, which is not only a non-judicial body but observes none of the safeguards of judicial procedure.

3. The rights of petitioner herein, and the public interest in the efficient and economic operation of railroad transportation, are seriously impaired by the decision of the Court of Appeals below.

STATEMENT.

Petitioner is a corporation which, since 1907, has operated the Union Passenger Station, including an adjacent railroad yard and tracks, in Washington, D. C. Respondents are petitioner's employes, who man its switch engines as engineers and firemen. The facilities of the passenger station and the adjacent yards and tracks are used by The Pennsylvania Railroad Company, the Baltimore & Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Chesapeake & Ohio Railway Company—called the Tenant Lines—which operate passenger trains to, from and through Washington. The petitioner itself operates no passenger trains and employs no road-engine or road-train crews.

It has been the continuous operating practice at

the Terminal, since it was opened for use in 1907, that, when a loaded passenger train comes into the station from other places and has discharged its passengers at the platform, the road-engine, manned by the road-engine crew which brought the train in over the road, may haul the empty passenger cars to the storage yard en route to the round-house, whenever, in the judgment of petitioner, the efficient and prompt operation of the Terminal is thereby promoted. Similarly, when the preparation of a passenger train to leave Washington is called for, the road-engine, manned by the crew which will operate the train over the road, picks up the empty cars on its way from the engine-house to the station, and backs the train of cars to the platform to receive passengers preparatory to leaving on its trip, whenever efficiency and promptness of operation so require. These road-engine crews are employes of the Tenant Lines. (Complaint, Pars, 8, 9, 10; R. 5.)

On February 1, 1923, a collective agreement in writing was entered into between petitioner and its yard-engine employes, the class of employes to which respondents belong. (Complaint, Par. 17; R. 7.) This agreement contained, among other things, provisions regarding so-called "seniority rights" of the employes, which were substantially the same as those which had been contained in the contracts of employment between petitioner and its yard employes since June 1, 1910. (Complaint, Pars. 12, 13, 14, 15; R. 6; Exs. A. B. C. D; R. 15-39.) These "seniority rights"

entitled employes to vacancies and new jobs in the order of seniority of the employes who applied for them, and also provided for seniority as a factor in promotion. This agreement, with some immaterial amendments made from time to time, is still in effect. (Complaint, Par. 16; R. 7.)

After these agreements, containing substantially the same terms, had been in effect for many years, petitioners' yard employes advanced the contention out of which the present application for a declaratory judgment ultimately eventuated. That contention was to the effect that the agreement of 1923, by according "seniority" rights to yard engine employes, thereby conferred upon such employes by necessary implication a monopoly or exclusive right to perform without exception all work on petitioners' premises capable of being regarded or defined as "yard work," and that such "yard work" must be construed as including the work of moving empty passenger trains between the station and the storage yard,—this despite the fact that, at the time of the original grant of seniority in 1910 and thereafter, both before and subsequently to the contract of 1923, such work had, under the practice and usage of the terminal, continuously been performed by road engines of the Tenant Lines manned by road crews. (Complaint, Par. 19; R. 8.) In opposition to this contention, petitioner has consistently maintained that the 1923 agreement cannot lawfully be construed to confer on such employes any exclusive right to do the work claimed, in view

of the practice known to, and understood by, the parties before and at the time when that agreement was made and since that time, in the light of which practice the contract must, on universally accepted principles of general contract law, be interpreted. (Complaint, Par. 32; R. 12.)

After this controversy originated and the yard employes' claims had been rejected by petitioner, the employes without the concurrence or consent or participation of petitioner submitted the claim to the First Division of the National Railroad Adjustment Board. This Board was created by the amended Railway Labor Act enacted by Congress in 1934.

That Act set up the National Railroad Adjustment Board for the "adjustment" of disputes between carriers and their employes arising out of contracts with respect to rules, rates of pay and working conditions. The Board is composed of a number of Divisions. The First Division consists of ten members, five selected by the railroads and five by the national railroad labor organizations. The Act designates the First Division as the one to hear disputes between the carriers and their train and engine service employes. (Complaint, Par. 19, R. 8.)

In accordance with the Board's practice, the First Division, upon receiving the claim of petitioner's yard employes, notified petitioner to file a statement of its position within 30 days, and thereafter fixed a date for the appearance of petitioner and the representatives of the employes. Under the Railway Labor

Act (Section 3 First (i)), the Board was authorized to render an award at the request of one of the parties alone, and therefore petitioner was obliged to appear before the Board and separately state its contentions in opposition to the claim, at the risk of otherwise having an award or order of the Division entered against it by default. (Complaint, Pars. 19 to 22, inc.; R. 8.)

At the so-called "hearing" before the Division, witnesses could not be called and evidence could not be introduced because the rules of the Division forbade it (Complaint, Ex. E; R. 40-43). Thereafter, the Division was apparently unable to reach a decision because of the deadlock of its members, and, under the provisions of the Railway Labor Act (Section 3 First (l)), a Referee was appointed to sit with the Division and break the deadlock. In accordance with the Division's established practice, no opportunity was given petitioner to appear before the Referee or present to him written or oral argument on the facts or the law. With the participation of the Referee, the Division decided the claim in favor of the employes, and, on October 24, 1938, it issued an "award" sustaining the claim. (Complaint, Pars. 24, 25, 26; R. 9.)

Petitioner, believing the award to be erroneous in point of law and not required by or in accord with the agreement of 1923, did not change its operating practices to conform to the award. Within a month after the date of the award respondents began to

present, and have continued to present, claims and demands upon petitioner for sums of money that they allege they would have earned had they been permitted to perform the work which they claim they have a right to perform under the contract, but which is being performed by road-crews of the Tenant Lines. These claims for payments have been made notwithstanding the fact that many of respondents are and have been, during the period for which the claims are presented, actually engaged in performing yard work in and about the Terminal for which they are already receiving and have received full daily wages. Their demands thus amount to claims for wages which they contend they should be permitted to earn for performing work now being done by the road-crews of the Tenant Lines, in addition to the wages which they are actually earning. (Complaint, Par. 29; R. 11.)

The Railway Labor Act (Section 3 First (p)) authorizes a person for whose benefit an award by a Division of the Adjustment Board has been made to bring a proceeding to enforce the award in an appropriate United States District Court, within two years from the time the cause of action accrues under the award. No suit on the award in question has been instituted against petitioner. The Railway Labor Act makes no provision for a statutory method whereby the carrier against whom an award has been made by the Board can invoke the jurisdiction of the courts to determine the validity or legal effectiveness of the award.

The demands of respondents, if met in full by petitioner, would require the payment by it of a total principal amount of approximately $80,000 a year. Petitioner, in addition to being pressed by respondents for payment, was confronted with the dilemma of having to decide between complying at once with the award and thereby waiving all opportunity for judicial determination of its rights and obligations under the contract of 1923, on which the award was purportedly based, or waiting until such time as respondents might choose to sue on the award, in which event petitioner might be compelled to pay the full amount of wages claimed by respondents for work not performed by them, in addition to the wages paid to other employes for performing that work (Complaint, Pars. 28-32; R. 10-13).

In other words, if petitioner, faced with an award against it of the kind involved in the present suit, should refuse to comply with the award and at the same time had no opportunity for initiating a proceeding for judicial determination of its obligations under the contract on which the award was purportedly based, the employes might wait until the last day of the two-year period before bringing an enforcement suit, in which event, if the enforcement suit were successful, petitioner would be obliged to pay twice over for all the work in question done during the two-year period and prior thereto—once to the employes who in fact performed the work and a second time to the claimants who claimed the right

to perform the work but did not in fact do it. These circumstances would inevitably constitute a steadily increasing pressure on petitioner to comply immediately with the award by changing its operating practices and thereby reducing the damages to the amount of back wages accruing to the claimants up to the date of such change.

The experience of rail carrier-employers generally under the Railway Labor Act indicated that respondents would not sue promptly or at all on the award but would allow the full pressure of the circumstances to operate, re-inforced by exertion of their own economic power, through threat of a strike, for the purpose of obtaining from the carrier full compliance with the award without a judicial determination of the basic rights and liabilities of the parties under their contract.*

Accordingly, petitioner, being desirous of having its rights under the contract judicially determined and having no other method open to it of achieving that result, instituted this suit under the Declaratory Judgments Act to obtain a judicial determination and declaration of its rights and liabilities under the contract of February 1, 1923. (Complaint, Par. 33; R. 13.)

Respondents, in the first defense set up by their answer, alleged that the complaint failed to state a cause of action. In the second defense of their answer, respondents contended—apparently because the com-

* See *infra*, pp. 29-32.

plaint showed on its face the proceedings before the Adjustment Board—that:

> "(1) The Complaint fails to show the existence of an actual controversy between the plaintiff and the defendants;
>
> (2) The Complaint affirmatively shows that there exists a remedy especially provided by statute for this type of case;
>
> (3) The Complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure judicial review of a decision of an administrative Board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act;
>
> (4) The Complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff" (R. 55).

On the grounds thus alleged in the first and second defense, the District Court, treating these defenses as a motion to dismiss, entered an order dismissing the complaint (R. 326). Petitioner appealed to the Court of Appeals, and that Court, after considering the case for nearly two years, affirmed the District Court in an opinion by Rutledge, *J.*, with Stephens, *J.*, dissenting (R. 331-81; 124 F. (2d) 235-77).

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals of the District of Columbia erred:

(1) In holding that Section 3 First (p) of the Railway Labor Act is to be construed, despite the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, where such a proceeding would otherwise be appropriate;

(2) In holding that Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer, with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes;

(3) In holding that the construction given by it to the Railway Labor Act, to the effect that the unilateral submission of such a dispute by the employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the courts to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Act, is not an unreasonable construction and is not inconsistent with

the reasoning of this Court in *Moore* v. *Illinois Central R. Co.*

(4) In holding that a construction of the Railway Labor Act which prevents the granting of the relief here sought by petitioner does not render that Act of doubtful constitutionality; and

(5) In affirming the judgment of the District Court below.

REASONS FOR GRANTING THE WRIT.

This case presents important new questions with respect to the construction of the Railway Labor Act of 1934. The decision of the Court of Appeals below, from which Judge Stephens dissented, should be reviewed by this Court because:

1. The construction placed upon the Railway Labor Act, and particularly Section 3 First (p) thereof, by the majority of the Court of Appeals below is unreasonable, in that, although unsupported in the legislative history or the language of the Act or in any authoritative interpretation or statutory analogy, it nevertheless gives to the Act an operation which, under the facts in the case at bar, has the effect of compelling the carrier to submit to the method of "adjustment" provided therein — although admittedly not intended by Congress to be a system of compulsory arbitration—and also of compelling the carrier to accept as final, and to comply with, an award against it by the Adjustment Board—admittedly

a non-judicial body—without any opportunity for a judicial determination of its legal rights and liabilities under the contract on which such award is purportedly based.

2. The majority of the Court of Appeals below erroneously conclude that to permit the maintenance of a suit like the present one would deprive the employes of advantages which Congress intended them to have under Section 3 First (p) of the Railway Labor Act, and for the preservation of which the majority contend that the procedure provided in that Section must be regarded as exclusive of any other method of obtaining a judicial determination of the rights and liabilities of the parties under their contract. The truth is that the institution of a proceeding like the present one does not in fact prevent the employes from obtaining any advantages which Congress may have intended them to have by such a suit.

3. The decision of the majority of the Court of Appeals below is in conflict with the reasoning and decision of this Court in *Moore* v. *Illinois Central R. Co.*, wherein it was held that the procedure provided by the Railway Labor Act for the adjustment of disputes arising out of contracts between carriers and their employes was not intended to be exclusive but was intended to be a voluntary system of adjustment;

4. The construction placed upon the Railway Labor Act by the majority of the Court of Appeals below is not to be adopted if an alternative construction is available, because it would render that Act of doubtful constitutionality, in that its practical operation would be to deprive

petitioner of any opportunity for a judicial determination of its rights and to compel it in fact to be bound by the award of a non-judicial body, to wit, the Adjustment Board.

The Railway Labor Act of 1934 created the National Railroad Adjustment Board as a means of "adjusting" disputes arising out of contracts between carriers and their employes concerning rules, rates of pay and working conditions. After the possibilities for settling such a dispute through negotiation and discussion have been exhausted, the dispute may, under the Act (Section 3 First (i)), be submitted jointly by both parties, *or by either party separately,* to the Board. The Act provides in Section 3 First (p) thereof for a method of judicial determination of the rights and liabilities on which an award is purportedly based, on the initiative of the employes, but no method for such judicial determination on the initiative of the carrier is provided. The only provision in the Act which specifies the status or effect of an award of the Board in such a suit by the employes under Section 3 First (p) is that portion of Section 3 First (p) which provides that, in a suit thereunder, "the findings and order of the Division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated." There is nothing in the Act which purports to deny to the carrier-employer any right of action or recourse to any procedure which would otherwise be open to such employer.

1. The National Railroad Adjustment Board is Not Entitled to be Regarded as a Judicial or Quasi-Judicial Tribunal, in View of the Manner in Which it is Constituted and the Nature of its Procedure.

The National Railroad Adjustment Board, because of the way in which its members are chosen and compensated and because of the procedure which it follows, cannot be regarded as a judicial or quasi-judicial tribunal (like the Interstate Commerce Commission, the Federal Communications Commission or similar bodies) whose adjudications may foreclose the issues decided from being re-examined *de novo* in a court of law. In the first place, the Board is not, and under the Act is not intended to be, a body of public administrative officials compensated from the public treasury. The Act provides (Section 3 First (a)) that the Board shall consist of members, half of whom are selected by the carriers and half by such organizations of employes, nation-wide in scope, as have been or may be organized in accordance with the provisions of Section 2 of the Act. It is further provided (Section 3 First (g)) that "each member of the Adjustment Board shall be compensated by the party or parties he is to represent."* In this

* The Act does provide that, where a referee is called in for the purpose of breaking a deadlock among the members of the Board, such referee shall be paid by the Mediation Board, which is a governmental agency (Section 3 First (l)). However, a referee who is thus called in for particular cases is not a regular member of the Adjustment Board, and is not a specially trained administrator, "informed by experience" of the specialized character which is found in the case of a member of the Interstate Commerce Commission, for example. (See *Illinois Cent. etc. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 454 (1907)). Furthermore, his vote is only one of the votes which decide the case.

respect the Board is of course an altogether different type of body from a quasi-judicial tribunal like the Interstate Commerce Commission, whose members are appointed by the President and paid from the United States Treasury.

In the second place, the procedure followed by the First Division of the Adjustment Board is not that of a judicial or quasi-judicial body. Under the Act (Section 3 First (i)), the Board may render an award on the submission of one of the parties alone, without the joinder or appearance of the other party. If the carrier does appear, it is required by the First Division to answer the claim without seeing the statement of claim presented to the Division by its adversary. (Complaint, Par. 20, Ex. E; R. 8, 41-42.) At the so-called "hearings" before the Division, no witnesses are called to testify and no evidence is introduced as to the facts relied on by the claimants; *ex parte* allegations are received by the Division as proof, without any opportunity to the parties for cross-examination or other means of testing the truth of the allegations. (Complaint, Pars. 22-23; R. 8-9.) No record, stenographic or other, is made of the hearing. (Complaint, Par. 23; R. 9.) If the Division is unable to reach a decision because of deadlock among its members—as was the situation in the present case—a referee is called in under the provisions of the Act (Section 3 First (l)), and the referee joins in the decision of the case without evidence and without any argument, written or oral, from the

parties. (Complaint, Pars. 24-25; R. 9.) Finally, the award of the Division contains no findings of fact in any proper sense. (See so-called "findings" and award in present case—Complaint, Par. 26; R. 9.)

Clearly, this procedure is wholly unlike that followed by the Interstate Commerce Commission and other quasi-judicial tribunals. That the Adjustment Board is neither constituted nor operated as a judicial or quasi-judicial body has been freely admitted by the respondents in their briefs in the courts below (R. 86-87, 131). For example:

> "Both in personnel and in organization this Board departs somewhat from traditional *judicial* concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bipartisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is against him, his cause must surely be just and he will prevail." (Defendants' Memorandum Brief, p. 20, R. 86.)

And again:

> "A judge *decides* the case before him, while, as its name implies, this Board is intended to adjust matters submitted to it. 'Compromise' judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the

Board will often fulfill the exact purpose for which it was created." (Defendants' Memorandum Brief, p. 21, R. 87.)

Respondents have thus admitted that the Adjustment Board does not act judicially:

"Its own organization is not that of a non-partisan judicial tribunal, but of a bipartisan conference group. Its function is to adjust, to compromise, to settle, rather than to judge the disputes which come before it." (Defendants' Memorandum Brief, p. 65, R. 131.)

Indeed, respondents have gone so far as to state in their briefs below, that the function of the Board is not the judicial one of interpreting and applying the basic agreement between the parties, out of which the dispute arises, but rather that of making new arrangements—in other words, a new agreement—between the parties if in the judgment of the Board such new arrangements are essential to a proper continuance of the parties' future relationship (R. 132-133). Thus, respondents have said:

"* * * *The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement.* The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.

"*The function of a court is to render a judgment between parties who are before it as liti-*

gants. Such a judgment has the effect of establishing the parties' present rights. *With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary.* It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but *the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption."* (Defendants' Memorandum Brief, pp. 66-67, R. 132-133.) (Emphasis supplied.)

In view of these facts, and the admissions made by respondents, it is quite clear that the Adjustment Board is in no sense a judicial or quasi-judicial tribunal, with respect to its intended function, its composition, or its operation. And yet, the decision of the majority of the Court of Appeals below construes the Railway Labor Act so as to give it the

effect of depriving a carrier in petitioner's position, who has been compelled by the employes' unilateral submission to be subjected to the issuance of an award against it by this non-judicial body, of any opportunity for a judicial determination of its rights and liabilities under its contract, save at the will of the employes in a suit brought to enforce such award under Section 3 First (p) of the Act. On the facts of this case, the result of that situation is that the carrier is forced by economic pressure to abide by the award of the non-judicial body without any judicial determination of its rights.

2. Under the Decision of the Majority of the Court of Appeals Below as Applied to the Facts of This Case, the Railway Labor Act Operates in Such a Manner as to Impose Upon the Carrier a Compulsory Method of Adjustment of Disputes With its Employes and to Deprive the Carrier of Any Opportunity for a Judicial Determination of its Rights and Liabilities.

Since the Railway Labor Act makes it possible for employes to submit a dispute to the Adjustment Board entirely without the consent of the carrier, it follows that if, after such a unilateral submission and the issuance of an award favorable to the employes, the carrier is denied—as it is under the decision of the majority below—the opportunity of obtaining a judicial determination of its rights except in a suit brought by the employes under Section 3 First (p) of the Railway Labor Act, then the carrier is in effect

deprived of an opportunity to have its contract rights judicially determined, save at the option of the employes. But the fact is plain that it is not to the employes' interest to bring such a suit under Section 3 First (p), because, when an award is of such doubtful legality that it would probably not be sustained by a court, they can obtain compliance with the award as a result of the economic pressure of the circumstances and of their own economic power, which ordinarily are sufficient to compel the carrier to comply with the award.* The consequence is that the carrier is in effect compulsorily deprived of any opportunity for a judicial determination of its rights under the contract on which the award is purportedly based.

The fact that the adjustment procedure set up under the Act does as a practical matter operate in this compulsory way upon the carrier is clearly demonstrated by the circumstances of the case at bar.

The record shows that, when efficiency and promptness of operation require it, it is petitioner's present practice to employ the road-crews to do the work in question (Complaint, Par. 10; R. 5-6). It is not only petitioner's right but it is also in the public interest that petitioner's operations should be conducted in the most efficient and expeditious manner possible. Imposition upon petitioner of the requirement that the work in question should be done by respondents, in accordance with their claim and in

* See *infra*, pp. 30-32.

place of petitioner's present practice, would, on the allegations of the complaint—which must be taken to be admitted for the purpose of this stage of the proceeding—interfere with and impair the efficiency of petitioner's operations. The award of the Adjustment Board, in sustaining respondents' claim, requires in effect that petitioner change its operating practices in this respect, so as to permit respondents to do this work. Furthermore, the award, if complied with, requires that respondents be paid full wages for each day that they have not been permitted to do the work, subsequent to the presentation of their claims.

When petitioner is faced with such an award of the Board as that sustaining respondents' claim, it has two alternatives before it. In the first place, it can immediately comply with the award and change its operating practices so as to permit respondents to do the work. If it does so, it will be sacrificing its own interests, and also the public interest, by interfering with the efficiency of its operation, and will be doing so without any judicial determination as to whether or not it is legally obliged to do so. In the second place, it can refuse to comply with the award and continue its practices as they are at present. But if it adopts this alternative, each additional day in which it refuses to permit respondents to do the work will add to the amount which it will have to pay to respondents if it should be ultimately determined that the award of the Board rests upon a proper construction of the contract. For example, if

it adopts this second alternative, it may so happen that, on the 364th day of the second year following issuance of the Board's award, it will be confronted with a suit under Section 3 First (p) of the Railway Labor Act, which suit might, if the Board's award is upheld, result in petitioner's being compelled to pay back wages to respondents for 728 more days' wages than would have been the case if petitioner had complied with the award on the day following its issuance.

In other words, the total cost to petitioner in connection with the dispute in question would be very much less if it sacrificed its right to a judicial determination of the issues and complied promptly with the Board's award than the cost would be if it refused compliance and was ultimately compelled to yield to respondents' demands by suit brought at the last possible moment under the Railway Labor Act. If petitioner is denied declaratory relief in the present proceeding, there is no way for it to avoid the risk of having ultimately to pay the much larger sum, except by prompt compliance with the award. It is obvious that, under such circumstances, the passage of time following the Board's award, and the consequent mounting of the sum which petitioner may ultimately have to pay, operates to increase continually the pressure on petitioner to comply promptly with the Board's award, and thereby to impede the efficiency of its operation, without a judicial determination as to whether or not it is legally obliged to do so.

Still more importantly, in addition to this pressure created by the circumstances of the situation, the organizations of the employes are always in a position to exert and do in fact frequently exert the full pressure of their economic power, through threat of a strike, to compel compliance with such awards of the Board. This was admitted by respondents in their brief in the District Court below, where they said: "The orders of the Board find their primary sanction in the *collective economic bargaining power of the employees*" (R. 103). (Emphasis supplied.)* It is a well known fact that under modern conditions carriers are held primarily responsible by public opinion for the maintenance of undisturbed transportation operations, and this is a responsibility which carriers cannot afford to disregard. The threat of a strike directly impedes the proper discharge of this responsibility in such a way that it creates a serious and effective pressure upon the carrier to comply with the employes' demands, and so constitutes a weapon which can seldom be ignored or defied. Of course it is true that the Railway Labor Act provides for the appointment of an Emergency Board by the President in the case of a threatened strike, and prohibits any change in the *status quo* during the consideration of the dispute by such Emergency Board and for a period of thirty days thereafter.† However, this additional procedure provides no relief for the carrier, since there is nothing in the law to prevent the employes from renewing the pressure of their economic power after the expiration of thirty days following the decision of the Emergency Board, in the event that

* See also *infra*, pp. 30-32.

† Act of May 20, 1926, c. 347, sec. 10, 44 Stat. 586-87, 45 U. S. C. 160.

they do not like that Board's decision.* Moreover, resort to the Emergency Board procedure serves merely to prolong the delay which of itself operates to compel compliance with the award, and contains no more assurance of an ultimate judicial determination of the rights of the parties than does the procedure before the Adjustment Board. The function of the Emergency Board is not to determine judicially the legal rights and liabilities of the parties under the contract but merely to endeavor to find some method of settling the dispute, if possible.

These circumstances mean that, if declaratory relief is to be denied to a carrier in the position of petitioner in this case, employes having a dispute with the carrier may first compel a submission of the dispute to the Adjustment Board, without any consent on the part of the carrier, and may thereafter by economic pressure compel the carrier's complance with an award by the Board in the employes' favor, without any judicial determination of the rights and liabilities of the carrier under its contract with the employes. The fact that the Railway Labor Act does in practice actually thus operate to compel compliance by carriers with awards by the Board against them is demonstrated by the almost complete absence of suits under Section 3 First (p) to enforce awards against carriers. The opinion of the majority below shows that, according to statistics available in 1938,

* The events of the recent nation-wide wage controversy between the rail carriers and the employes' organizations, of which this Court may take judicial notice, illustrated the possibility of a threatened strike against a decision of an Emergency Board not acceptable to the employes' organizations.

out of a total 3,134 decisions rendered by the Board up to that time, the claims against the carriers were sustained in full in 1,745 cases and in part in 394 additional cases—altogether, nearly two-thirds of the total (R. 336, note 11; p. 242 of 124 F. (2d)). And yet there were only two cases in which a judicial determination was had of the rights of parties thus concerned with an award of the Adjustment Board. One such case is cited by the majority below (R. 342, note 24; p. 246 of 124 F. (2d)), as the only case discovered of an enforcement suit under Section 3 First (p) of the Act: *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5th, 1937). Another case of judicial review of Adjustment Board action is cited in Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale, L. J. 567, at p. 592 (an article which is referred to several times by the majority below), viz., *Griffin* v. *Chicago Union Station Co.*, 13 F. Supp. 722 (N. D. Ill., 1936). In this connection, the following passage from Garrison's article is worth noting (pp. 591-92):

> "The Board has no powers of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance. This the union can do in two ways: first, by petitioning the appropriate United States District Court for an order enforcing the Board's award, pursuant to the procedure laid down by the statute; and secondly, by economic pressure. *The first course has not been adopted.* Out of 1,616 awards handed down by the four Divisions up to July 30, 1936, of which considerably over half must have been in favor of

the employees, not one was taken to court for an enforcement order, and *the presumption is either that the carriers willingly complied in all these cases, or that, in some of the cases where the carriers did not at first comply, compliance was brought about by threatened strikes.*

"The net result is that, with one exception, *no judicial review of the Board's capacity, procedure or decisions has been had, and none is likely to be had.*" (Emphasis supplied.)

3. The Present Proceeding is an Appropriate One for the Exercise of Declaratory Judgment Jurisdiction, in the Absence of Some Statutory Impediment.

In view of these circumstances, it is clear that the case is an appropriate one for the exercise of declaratory judgment jurisdiction, under the Federal Declaratory Judgments Act. It is an actual controversy, consisting of specific claims for money made by respondents and refused by petitioner. (Complaint, Par. 29; R. 11.) The demands of respondents are made under and on the basis of the contract between the parties, and not under the Board's award, as respondents have admitted.* In such a situation a

* Thus, in their brief in the District Court below (included in the record of the Court of Appeals below and in the record filed with this petition) respondents stated:

"These claims, however, *are based upon the Agreement of 1923—not upon the order of the Board*" (R. 117). (Emphasis as in respondents' brief below, p. 51.)

Again, in the same brief (p. 53):

"When the individual defendants presented to the plaintiff, individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order which has no substantive effect and is in itself unenforceable * * *. *The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued*" (R. 119). (Emphasis supplied.)

declaratory judgment proceeding initiated by the party defending against the claim is appropriate for determination of the rights of the parties, even though the claimant has available another procedure by which he could enforce his claim but to which he does not resort: *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 57 S. Ct. 461 (1937). Moreover, the circumstances of the present case, whereby, as shown above, petitioner is subject to increasing economic pressure toward compliance with respondents' demands, make declaratory relief not only an appropriate but a necessary remedy.* Nor is resort to a declaratory judgment proceeding barred, in this case, by the authorities which establish the rule that such a proceeding may not be used to review the decision of another judicial or quasi-judicial tribunal, since that rule clearly does not contemplate awards of a body like the National Railroad Adjustment Board, which, as shown above (pages 20-25), is not constituted and does not operate in a judicial or quasi-judicial manner and is not in any sense such a tribunal.

The majority of the Court of Appeals below did not deny that the present controversy would be an appropriate one for the exercise of declaratory judgment jurisdiction in the absence of the Railway Labor Act. However, the majority below took the position that Section 3 First (p) of that Act manifested a

* This point is substantiated by the legislative history of the Federal Declaratory Judgments Act, as well as by judicial interpretation of it, as for example, in *Edelmann and Co.* v. *Triple-A Specialty Co.,* 88 F. (2d) 852, 854 (C. C. A. 7th, 1937). See the discussion by Judge Stephens in his dissenting opinion below (R. 356; pp. 258-9 of 124 F. (2d)).

Congressional intent that the procedure provided for therein should be exclusive of all other methods of judicial determination of the rights of the parties.

4. It is Erroneous to Conclude, as Does the Majority Below, That Section 3 First (p) of the Railway Labor Act Must, in Order to Preserve to the Employes Advantages Thereunder Which Congress Intended Them to Have, be Construed to Exclude Any Other Proceeding, Such as the Present One, for the Judicial Determination of the Rights and Liabilities of the Carrier and Its Employes Under Their Contract.

It is not claimed by the majority of the Court of Appeals below that there is anything in the legislative history of Section 3 First (p) of the Railway Labor Act to indicate that it was intended to be exclusive of all other methods of judicial determination of the rights of the parties, and such a claim could not successfully be maintained, because no reference whatever to Section 3 First (p) is to be found in the reports of legislative consideration given the Act in the Houses of Congress.* Moreover, there is no language in the Act itself which specifically indicates that the procedure under Section 3 First (p) was intended to be exclusive. The majority below did, however, conclude that an intent on the part of Congress that the procedure under Section 3 First (p) should be exclusive could by implication be inferred from the provisions of that Section. The

* See House Report No. 1944 and Senate Report No. 1065, 73d Congress, Second Session.

reason advanced by the majority for arriving at that conclusion was that the method of judicial determination provided in Section 3 First (p) of the Act gives to the employes certain definite advantages which Congress intended them to have and to retain unimpaired. The intent of Congress to secure these advantages to the employes would be frustrated, the majority below concluded, if the carrier of its own motion were permitted to seek judicial determination of its rights under the contract.*

But if that argument is sound, then it would serve to defeat every declaratory judgment proceding, since in every such proceeding the party against whom declaratory relief is sought, and who would otherwise have the initiative, is deprived of the advantage of having that initiative, including choice of venue and forum and of the time of bringing suit. And yet it is well established that the right of a beneficiary under an insurance policy, for example, to bring suit against the insurer for the purpose of enforcing the policy, and the attendant privileges with respect to choice of venue and time, do not bar a declaratory judgment proceeding instituted by the insurer for the determination of an existing controversy, in the absence of an actual suit by the beneficiary on the policy (see, e. g., *Aetna Life Ins. Co.* v. *Haworth, supra*).

Moreover, the majority below failed to realize that

* See discussion in majority opinion below (R. 333-35; pp. 239-41 of 124 F. (2d)).

the institution of a declaratory judgment proceeding like the present one does not in any way bar the employes in whose favor an award has been issued from securing for themselves the advantages of Section 3 First (p) by instituting suit thereunder. Under the governing principles and authorities it is clear that such a suit, if promptly instituted by the employes, could proceed to judgment notwithstanding the prior institution of the declaratory judgment proceeding. The declaratory judgment suit, being a proceeding purely *in personam,* would not operate as a bar to a subsequently instituted suit under Section 3 First (p) of the Railway Labor Act. This is clearly established by the cases.† Moreover, the court having jurisdiction of the declaratory judgment suit would have discretionary power to stay that proceeding in favor of the employes' suit under Section 3 First (p), and, upon a proper application by the employes as defendants in the declaratory judgment suit and upon a showing by them that Congress intended them to have advantages in the suit under Section 3 First (p) which they could not have in the declaratory judgment suit, the court would undoubtedly exercise its discretion to stay the declaratory judgment proceeding, so as to permit the suit under Section 3 First (p) to proceed to judgment without

† See especially *Kline* v. *Burke Const. Co.,* 260 U. S. 226, 230, 43 S. Ct. 79, 81 (1922); and *New York Life Ins. Co.* v. *Roe,* 102 F. (2d) 28, 31-32 (C. C. A. 8th, 1939)—the latter case involving a situation closely analogous to the present one.

risk of conflict.* Refusal by the court to grant such a stay would clearly be an abuse of its discretion, particularly since during the argument in the District Court counsel for petitioner offered to raise no objection to permitting a suit by the employes under Section 3 First (p) to proceed in preference to the declaratory judgment suit (R. 300).

The purpose of petitioner in instituting the present declaratory judgment suit is not to deprive the employes of advantages in litigation which they would have and which Congress intended them to have in a proceeding under Section 3 First (p) of the Railway Labor Act. Petitioner is concerned, not that it shall have judicial relief in any particular form, but that it may have an opportunity for judicial determination, in *some* form, of its rights and liabilities under the contract with its employes, and that it shall not be forced to comply with the Board's award without judicial consideration of the question whether that award represents a correct interpretation of petitioner's obligations under the contract.

Clearly, therefore, the majority of the Court of Appeals below erred in assuming that it was necessary to construe the Railway Labor Act so as to exclude a declaratory judgment proceeding like the present one, in order to preserve to the employes such advantages as Congress intended them to have in a suit under Section 3 First (p).

* See, for example, *Landis* v. *N. American Co.*, 299 U. S. 248, 254-55, 57 S. Ct. 163, 166 (1936), and also the language of Mr. Justice Cardozo in *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 212-16, 57 S. Ct. 377, 379-80 (1937).

5. The Decision of the Majority of the Court of Appeals Below, in so Construing the Railway Labor Act as to Give It a Compulsory Effect in its Practical Operation, is in Conflict With the Reasoning of This Court in Moore v. Illinois Central R. Co.

Subsequent to the argument of the instant case in the Court of Appeals, but prior to publication of the decision of that court, this Court decided the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941). Both the majority and the dissenting opinions in the Court of Appeals discuss the *Moore* case, although there had been no argument before the court as to its applicability to the present case. The decision of this Court in the *Moore* case squarely establishes the proposition which petitioner herein advanced in the Court of Appeals below, to the effect that the method provided in the Railway Labor Act for the adjustment of disputes arising out of contracts between carriers and their employes is not an exclusive method for the adjustment of such disputes. In so holding, this Court said that the adjustment procedure provided in the Railway Labor Act was not "based on a philosophy of legal compulsion," but was essentially a "system for peaceful *adjustment and mediation voluntary in its nature.*" (Emphasis supplied.)*

* See pages 634-36 of Mr. Justice Black's opinion in 312 U. S. In that case suit was brought in behalf of an employe against the railroad for damages for breach of contract, and this Court, in sustaining the district court's judgment for the employe, rejected the argument that the suit was prematurely brought because the employe had failed to exhaust the so-called "administrative" remedies granted him by the Railway Labor Act.

It has been shown above that the denial by the majority of the Court of Appeals below to the carrier of an opportunity for a judicial determination of its basic rights otherwise than by a proceeding brought by the employes under Section 3 First (p) means that a carrier having a dispute with its employes may be compelled, by unilateral submission of the dispute on the part of the employes to the Adjustment Board, to subject itself to a decision of that Board under the adjustment procedure provided in the Railway Labor Act, and may further be compelled, by economic pressure, to comply with an award of the Board against it, without any judicial determination of its rights and liabilities under the contract on which the award is purportedly based. Clearly, a system of adjustment which operates in such a manner can only be described as in fact compulsory, and the decision of the majority below must be considered as so holding. In that respect, it is directly in conflict with the reasoning of this Court in the *Moore* case. If a carrier is denied the opportunity of obtaining declaratory relief in a proceeding like the present one, the method of adjustment provided in the Act, so far from being a system "voluntary in its nature," is in fact one which operates in actual practice to *compel* the carrier to abide by the result of the adjustment method. A method of adjustment which operates in that manner is in no sense voluntary, in so far as the carrier is concerned.

The majority of the Court of Appeals below ap-

parently recognized the inconsistency between the result which they reached and this Court's decision in the *Moore* case, and attempted to establish a distinction between the two cases. The majority below conceded that, under the *Moore* decision, the method of adjustment provided in the Act was one which the parties were not obliged to choose in the first instance, and that the employes, for example, could ignore the statutory procedure altogether and recover against the carrier in a suit for damages. However, the majority below took the further position that there was no conflict with the *Moore* decision in holding that, when the parties had once "voluntarily" invoked the method of adjustment provided in the Railway Labor Act, they were thereafter bound to abide by that method, and, when an award of the Board had been issued, were limited to the procedure provided in Section 3 First (p) of the Act, as the only means of obtaining a judicial determination of the rights of the parties under the contract on which the award was purportedly based.

This conclusion is erroneous, for the double reason that (1) it fails to distinguish between a joint submission by the parties under Section 3 First (i) of the Act and a separate submission under the same paragraph by the employes without the joinder or consent of the employer, and treats action by the carrier in appearing before the Board to ward off a default award, as equivalent to a joinder by it in the submission, whereas it is not so equivalent, and (2) be-

cause, even if this distinction is ignored, the conclusion of the majority below rests upon assuming the point to be proved, namely, that where there has been a voluntary resort to the adjustment procedure the statutory judicial remedy under Section 3 First (p) must be treated as exclusive—an assumption which is based solely upon the argument shown in the preceding section to be unfounded, that otherwise the employes would be deprived of advantages which Congress intended to secure to them.

The majority below treat the submission of the dispute to the First Division of the Adjustment Board in the present case as a joint submission or a submission with the consent or participation of petitioner, and conclude therefrom that such consent on petitioner's part thereafter barred it from obtaining a judicial determination of its rights otherwise than as such might be obtained if respondents after the award should bring a suit under Section 3 First (p). The notion of the majority below seems to be that where, as in the present case, the carrier separately appeared before the Board to avoid a default-award against it resulting from a unilateral submission of a dispute by the employes, which submission the carrier had refused to join, such separate appearance constitutes a voluntary choice or election on the part of the carrier of the method of adjustment provided in the Railway Labor Act, including the procedure set up in Section 3 First (p) thereof, as the appropriate

method of settling the dispute.* The defectiveness of this reasoning is plain. It results from ignoring the fact that, under the Railway Labor Act (Section 3 First (i)), the adjustment procedure therein provided may be invoked by either party, acting separately, by the submission of the dispute to the Board by such party without the consent of the other party or parties to the dispute. As a consequence of this provision in the Act, the Board has claimed, and has in fact exercised (as appears from its published reports†) the power to enter an award, in the case of a dispute so submitted, regardless of whether or not the carrier appears before it. Under such circumstances, the separate appearance of the carrier in opposition to a unilateral submission of the dispute by the employes is not in any sense a voluntary election on the part of the carrier to resort to the statutory method of adjustment,—as might be true in the case of a joint or concurrent submission by both parties—because the Board would proceed without such appearance by the carrier and would enter an award against it in default of appearance. It follows that the status of the Board's award with respect to the rights of the carrier is not in any respect altered or enhanced by the fact that the carrier may have separately appeared, as in the

* See discussion in majority opinion below (R. 338, 345; pp. 243-4, 249 of 124 F. (2d)). The comments on this point in a footnote to the opinion (R. 332, note 5; p. 239 of 124 F. (2d)) suggest a confusion in the minds of the majority between questions as to a court's power over the *person* of a party, which is conceded by a general appearance by that party, and questions as to its power in other respects to adjudicate the issues before it, which is not conceded by such an appearance.

† Vol. 12, "Awards, First Division, National Railroad Adjustment Board," pp. 318-370, inclusive (Government Printing Office).

present case, because the Board would have rendered precisely the same award in the absence of the carrier.

Accordingly, petitioner's separate appearance before the Board, in order to avoid the risk of having the Board make a default-award against it, cannot be treated as equivalent to a joint submission of the dispute to the Board. Such a joint submission might perhaps have constituted, on the part of petitioner, a voluntary choice or election of the adjustment method, of the kind the majority below had in mind. But there was no such joint submission. Therefore, there was no voluntary acceptance by petitioner of the adjustment method. The petitioner appeared merely to ward off a default-award, and, since the Adjustment Board admittedly does not constitute a tribunal of compulsory arbitration (R. 103), the appearance of petitioner before it cannot be held to constitute a waiver of any right to a judicial determination which petitioner would have in the absence of a joint submission to the Board.

From this it follows that the majority below have failed successfully to distinguish the present case from the decision of this Court in the *Moore* case. There was no voluntary choice or election on the part of petitioner in separately appearing before the Board in opposition to the employes' unilateral submission of the dispute, and the fact therefore remains that, under the decision of the majority below, the operation of the method of adjustment provided in the Act is compulsory, so far as the carrier is concerned,

contrary to the construction placed upon the Act by this Court in the *Moore* case.

Even conceding, however, and solely for the purpose of argument, that the majority below is correct in holding that there was an element of voluntary choice on the part of petitioner in appearing before the Adjustment Board, it does not follow that petitioner is thereby barred from any judicial proceeding for the determination of its contract rights otherwise than in a suit brought by the employes under Section 3 First (p). That conclusion would follow only by making a further assumption, which would be an assumption of the very point to be proved. It would follow only if it is taken for granted that the suit under Section 3 First (p) must be treated as an exclusive judicial remedy with respect to claims which have been submitted to the Adjustment Board. In the absence of any express Congressional intent to make that procedure exclusive, the conclusion that it must be regarded as such is founded by the majority of the Court of Appeals solely on the argument which has already been shown in the preceding section of this petition to be erroneous, viz., that otherwise the employes would be deprived of advantages which Congress intended to secure to them. Without the support of that argument, there is no foundation for the conclusion that, even if petitioner did participate in the proceeding before the Adjustment Board, it has thereby lost its right to any judicial remedy that might otherwise be open to it.

In short, the sole ultimate ground upon which the

decision of the majority below rests is comprised in the argument that this suit cannot be maintained because it would deprive respondents of the advantages that they would otherwise obtain from Section 3 First (p) of the Act, and that argument has been shown above to be completely erroneous. In the last analysis, that is the single issue upon which all the other issues now presented to this Court depend.

The majority below were apparently conscious of the difficulty involved in holding petitioner barred from its right to a judicial remedy, as well as of the difficulty of reconciling their position with the decision of this Court in the *Moore* case. This consciousness of uncertainty is shown by the suggestion made in the majority opinion that perhaps Section 3 First (p) of the Railway Labor Act should be construed not to bar altogether resort to the courts in a proceeding other than that provided therein, after submission to the Board and an award therefrom, but only to *suspend* the right of a carrier to invoke judicial relief in another form of proceeding during the two-year period following the issuance of the award, in which a suit under Section 3 First (p) can be instituted.*

The suggestion is offered tentatively by the majority below, apparently as a possible escape from the im-

* This appears in the language which the majority below used in connection with the *Moore* case (*e. g.*, R. 338, 345; pp. 243-4, 249 of 124 F. (2d)), especially the following:

> "The important thing is that the statute gave the initiative in litigation to review the award to the employee for two years. *For disposing of this case, it is immaterial whether this amounted to a mere suspension, for that period, of the employer's right to sue* or was intended, with other provisions of the Act, to bar it altogether" (R. 347; p. 251 of 124 F. (2d)). (Emphasis supplied.)

plied conflict between the decision of the majority below and the decision of this Court in the *Moore* case, and not as a positive holding of the court. But this suggestion serves merely to increase rather than to diminish the difficulties of the majority below. If Section 3 First (p) of the Railway Labor Act operates to suspend for two years the employer's right to a judicial determination of its dispute with the employe in any other proceeding than that provided by that Section, then, for the reasons already indicated, the procedure provided by the Railway Labor Act for adjustment of disputes becomes compulsory upon the carrier *for that period,* and to that extent is an embodiment of a "philosophy of legal compulsion," which, according to the *Moore* decision, was not within the intent of Congress.

Moreover, the suggestion that the carrier's right to a judicial determination of the issues in dispute otherwise than in a suit under Section 3 First (p) is merely suspended for two years does not provide any basis for dismissal of the present suit at this stage of the proceeding, since the two-year period has now expired, and had in fact expired when the decision of the Court of Appeals below was handed down. If this suggestion of the majority below were sound—and petitioner believes it is thoroughly unsound and serves merely to demonstrate the confusion in which the majority below find themselves—then, after the two-year period of suspension is over there would be no reason why the proceeding should not go forward, so as to permit a judicial declaration of the

rights of the parties. The reasoning of the majority below in this respect is thus in conflict with their conclusion. If the suggestion made in the majority's reasoning, that the carrier's right to a judicial determination otherwise than in a suit under Section 3 First (p) is merely suspended for two years following submission to the Board and an award therefrom, were really accepted by the majority below as sound, there would be no basis for reaching the conclusion which the majority in fact did, to the effect that this suit should be dismissed, even though the two-year period has expired. If, on the other hand, the suggestion is not a sound one—as petitioner believes—then the decision of the majority below must be construed as holding that resort by the carrier to a judicial determination of its rights is completely barred by the employe's unilateral submission of the dispute to the Board and the issuance by the latter of an award upholding the employe's claim. And in that event, for the reasons already shown, the decision of the majority below must be regarded as in conflict with the reasoning of this Court in *Moore* v. *Illinois Central, supra.*

The majority below seem to have in mind the notion that petitioner's separate appearance before the Adjustment Board constituted an election of remedies so as to bring into operation the doctrine according to which an election of one remedy may under some circumstances bar a subsequent shift to another inconsistent remedy. But this doctrine has no application to the present case, for two reasons: In the first

place, the doctrine presupposes a voluntary choice or election of the remedy first resorted to,* and it has already been shown that there was no such choice or election on the part of petitioner in this case. In the second place, the doctrine applies only where the remedies are inconsistent,† and no such condition exists in the present case, because both of the remedies in question are predicated on the same contract and the same theory as to the rights and liabilities of the parties, and are therefore not inconsistent with each other. Accordingly, the doctrine of election of remedies does not operate, under the facts of the present case, to bar the maintenance by petitioner of the present declaratory judgment proceeding.

6. Construction of the Railway Labor Act in the Manner Adopted by the Majority of the Court of Appeals Below, so as to Preclude Petitioner From Obtaining a Judicial Determination of its Rights in a Declaratory Judgment Proceeding, is, in the Light of the Facts of the Present Case, Unreasonable and Without Foundation, and Would Render the Act of Doubtful Constitutionality.

To construe the Railway Labor Act, and particularly Section 3 First (p) thereof, so as to bar petitioner

* See *Bierce* v. *Hutchins*, 205 U. S. 340, 346 (1907); *Pittsburgh Terminal Coal Corp.* v. *Bennett*, 73 F. (2d) 387, 389 (C. C. A. 3rd, 1934).

† See *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 294-5, 43 S. Ct. 100, 101 (1922); *McFadden Securities Co.* v. *Stoneleigh Garage*, 55 F. (2d) 1025, 1027 (App. D. C., 1932); *U. S.* v. *Ickes*, 73 F. (2d) 844, 849 (App. D. C., 1934). In fact, the doctrine of election of remedies appears to be regarded by modern courts with increasing suspicion, and its application today is limited and infrequent. See, for example, *Friederichsen* v. *Renard*, 247 U. S. 207, 211-13, 38 S. Ct. 450 (1918), and *Oil Well Supply* v. *First National Bank*, 106 F. (2d) 399, 404 (C. C. A. 10th, 1939).

from the right to bring the present proceeding, is in practical effect, as shown above, to preclude a carrier from any judicial determination of its rights under the contract with its employes, in a case where the employes have seen fit to submit a dispute to the Adjustment Board and thereby compel the carrier, without its consent, to be subjected to an award of the Board against it and to economic pressure toward compliance with the award. Clearly, such a construction of the Act is unreasonable. If the collectively bargained agreements to which the Act is intended to apply are really contracts, as the Act appears to contemplate, then there must be some practicable and available means for the parties, or either of them, to obtain a judicial determination as to the proper interpretation of the contract and their respective rights and obligations under it. *Otherwise, the effect of the Act would be—and, under the decision of the majority below, its effect is—to place these collectively bargained agreements in the same category as international treaties, which under present-day conditions have only such meaning and effect as the party with superior force chooses to allow them to have.* Petitioner believes that the Railway Labor Act should not be construed so as to reproduce international anarchy in the field of labor relations in the railroad industry, unless there is a clear and positive indication in the legislative history of the Act or on the face of the Act itself that Congress intended it to be so construed. But, as stated above (page 34), there is no such

indication either in the legislative history of the Act or on the face of the Act itself.

It has been claimed by respondents that Section 3 First (p) of the Railway Labor Act must be construed as providing an exclusive remedy because similar language in other statutes, viz., the Interstate Commerce Act and the Packers and Stock Yards Act has been so construed by the courts. But it is elementary law that similarly worded provisions in different statutes are not to be construed alike unless the statutes are *in pari materia*. And it is clear that the Railway Labor Act is not *in pari materia* with the Interstate Commerce Act and the Packers and Stock Yards Act, because the National Railroad Adjustment Board is not, for reasons already indicated (see pages 20-25, above), a quasi-judicial tribunal as is the Interstate Commerce Commission, for example, and also because an award of the Adjustment Board like that in the present case is not an order to pay a fixed amount of money, plus interest, but is in effect a finding that the carrier should change certain operating practices and also that it should pay to claimants a sum of money, the principal amount of which (quite apart from the question of interest) may vary substantially, according to the time in which and the conditions under which it is complied with. Therefore, the provisions of the Interstate Commerce Act and the Packers and Stock Yards Act do not provide an apt statutory analogy to the Railway Labor Act, and decisions con-

struing the former are accordingly not applicable to the latter.*

Construction of the Railway Labor Act in the manner adopted by the majority below, whereunder its operation will, as shown above, unfairly and unreasonably suppress judicial consideration and determination of the rights and liabilities of the parties with respect to any dispute which the employes may choose to submit to the Board, is to be rejected for the reason that the Act if so construed would be of doubtful constitutionality. So construed, it would mean that, despite the safeguards of Article 3, Section 1, of the Constitution of the United States and of the due process clause of the Fifth Amendment thereto,† one of two parties to a contract, viz., the carrier-employer party to a collectively bargained agreement with its employes, would, in the event of a dispute with respect to the interpretation of the contract, be bound by the decision of a non-judicial body of private persons, and would find the doors of the courts closed against it in actual effect, and held closed for a period of time sufficient to enable the other party to the contract to compel by extra-judicial means acquiescence in the construction of the contract

* In any event, a careful examination of the decisions cited by respondents and by the majority below in this respect shows that they do not establish any absolute rule of exclusiveness but simply hold that where the statutory judicial remedy under the Interstate Commerce Act, for example, is available to enforce a reparation order of the Commission, certain other statutory remedies are not available. See, *e. g., Baltimore & O. R. Co.* v. *United States,* 87 F. (2d) 605, 606; *Brady* v. *Interstate Commerce Commission,* 43 F. (2d) 847. *cf. Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 136-44, 59 S. Ct. 754, 760-64 (1939).

† See *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331 (1920).

favored by such other party. In place of such a result, the court should prefer a construction of the Act which would be consistent with all indications of Congressional intent as to the voluntary nature of the adjustment procedure, and at the same time would preserve to the statute a reasonable and fair operation and eliminate doubts as to its constitutionality.

This case is of basic importance not only because of the size of respondents' claims but also because of the operating practices involved, which petitioner, believing such practices to be essential to the efficiency of its operation and therefore desirable in the public interest, should not be compelled to change until its obligation to do so has been judicially determined; but the continuation of such operating practices may give rise to additional and increasingly numerous claims of the same nature, on the part of these or other similarly situated employes, and with respect to such claims petitioner will be without practical means of obtaining a judicial determination of its rights and liabilities if the relief herein sought is ~~not now~~ granted. If the decision of the majority of the Court of Appeals below is permitted to stand, a strong element of unfairness and unreasonableness will have been injected, with the approval of this Court and without any indication of Congressional approval or intent, into the relations between carriers and their employes.

WHEREFORE, it is respectfully submitted that this petition for a writ of *certiorari* to review the judg-

ment of the United States Court of Appeals for the District of Columbia should be granted.

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIZER,
1740 Broad St. Station Bldg.,
Philadelphia, Pa.
Counsel for Petitioner.

FEBRUARY 18, 1942.

SEP 25 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 28.

THE WASHINGTON TERMINAL COMPANY,
Petitioner

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER, THE WASHINGTON TERMINAL COMPANY.

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIKER,
1740 BROAD ST. STATION BLDG.,
PHILADELPHIA, PA.
Counsel for Petitioner.

SEPTEMBER 25, 1942.

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IN THE

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER, THE WASHINGTON TERMINAL COMPANY.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 331-48), and the dissenting opinion of Mr. Justice Stephens (R. 348-81), were handed down on November 18, 1941, and are reported in 124 F. (2d) 235.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on November 18, 1941 (R. 382). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347, 43 Stat. 938).

STATUTES INVOLVED.

This suit is brought under and in accordance with the Declaratory Judgments Act of June 14, 1934, c. 512, 48 Stat. 955, 28 U. S. C. 400 *et seq.*, as amended. The pertinent provisions thereof are as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Certain provisions of the Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151 *et seq.*) are involved because they have been relied on by respondents in the courts below. The portions of the Act principally concerned are Sections 3 First (i) and (p), which provide as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall

be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * * * *

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

QUESTIONS PRESENTED.

1. Whether or not Section 3 First (p) of the Railway Labor Act is to be construed, in the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, in a case where such a proceeding would otherwise be appropriate.

2. Whether or not Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes.

3. Whether or not the conclusion of the court below, to the effect that the unilateral submission of a dispute by employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the court to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Railway Labor Act, gives to the Railway Labor Act a construction which is unreasonable and is inconsistent with the construction placed upon it by this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941), wherein it was held that the procedure provided by the Railway Labor Act for the adjustment of such disputes was not intended to be exclusive.

4. Whether or not, in the face of Article III, Section 1, of the Constitution of the United States, and of the due

process clause of the Fifth Amendment to the Constitution, a construction of the Railway Labor Act, and more specifically Section 3 First (p) thereof, is to be chosen which would have the effect of making the awards of a non-judicial body, like the National Railroad Adjustment Board, to all practical purposes final and conclusive save at the option of the employes, and which would have the effect of closing the doors of the courts to railroad employers with the result of subjecting them to economic pressure in order to compel them to comply with such awards.

5. Whether or not, even if the National Railroad Adjustment Board is for the purpose of argument conceded to be a public quasi-judicial or administrative tribunal, the right of a party adversely affected by action of the Board, to a judicial reconsideration of the controversy passed upon by the Board, is to be denied, despite the policy of protecting the right to judicial review established by this Court in its recent decisions, especially in *Rochester Telephone Corp.* v. *United States,* and despite the fact that all the requisites for assertion of such right to review, as enunciated in those decisions, are satisfied in the case at bar.

STATEMENT.

Petitioner is a corporation which, since 1907, has operated the Union Passenger Station, including an adjacent railroad yard and tracks, in Washington, D. C. Respondents are petitioner's employes, who man its switch engines as engineers and firemen. The facilities of the passenger station and the adjacent yards and tracks are used by The Pennsylvania Railroad Company, the Baltimore & Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Com-

pany, and the Cheseapeake & Ohio Railway Company—called the Tenant Lines—which operate passenger trains to, from and through Washington. The petitioner itself operates no passenger trains and employs no road-engine or road-train crews.

It has been the continuous operating practice at the Terminal, since it was opened for use in 1907, that, when a loaded passenger train comes into the station at the end of its run and has discharged its passengers at the platform, the road-engine, manned by the road-engine crew which brought the train in over the road, may haul the empty passenger cars to the storage yard en route to the round-house, whenever, in the judgment of petitioner, the efficient and prompt operation of the Terminal is thereby promoted. Similarly, when the preparation of a passenger train to leave Washington is called for, the road-engine, manned by the crew which will operate the train over the road, picks up the empty cars on its way from the engine-house to the station, and backs the train of cars to the platform to receive passengers preparatory to leaving on its trip, whenever efficiency and promptness of operation so require. These road-engine crews are employes of the Tenant Lines. (Complaint, Pars. 8, 9, 10; R. 5.)

On February 1, 1923, a collective agreement in writing was entered into between petitioner and its yard-engine employes, the class of employes to which respondents belong. (Complaint, Par. 15; R. 6.) This agreement contained, among other things, provisions regarding so-called "seniority rights" of the employes, which were substantially the same as those which had been contained in the contracts of employment between petitioner and its yard employes since June 1, 1910. (Complaint, Pars. 12, 13, 14, 15; R. 6; Exs. A. B. C. D.; R. 15-39.) These "seniority rights" entitled employes to vacancies and new jobs in the order of seniority of the employes who applied for them, and also provided for seniority as

a factor in promotion. This agreement, with some immaterial amendments made from time to time, is still in effect. (Complaint, Par. 16; R. 7.)

After these agreements, containing substantially the same terms, had been in effect for many years, petitioner's yard employes advanced the contention out of which the present application for a declaratory judgment ultimately eventuated. That contention was to the effect that the agreement of 1923, by according "seniority" rights to yard-engine employes, thereby conferred upon such employes by necessary implication a monopoly or exclusive right to perform without exception all work on petitioner's premises capable of being regarded or defined as "yard work," and that such "yard work" must be construed as including the work of moving empty passenger trains between the station and the storage yard,—this despite the fact that, at the time of the original grant of seniority in 1910 and thereafter, both before and subsequently to the contract of 1923, such work had, under the practice and usage of the Terminal, continuously been performed by road engines of the Tenant Lines manned by road crews. (Complaint, Par. 19; R. 8.) In opposition to this contention, petitioner has consistently maintained that the 1923 agreement cannot lawfully be construed to confer on such employes any exclusive right to do the work claimed, in view of the practice known to, and understood by, the parties before and at the time when that agreement was made and since that time, in the light of which practice the contract must, on universally accepted principles of general contract law, be interpreted. (Complaint, Par. 32; R. 12.)

After this controversy originated and the yard employes' claims had been rejected by petitioner, the employes without the concurrence or consent or participation of petitioner submitted the claim to the First Division of the National Railroad Adjustment Board. This Board was created by the amended Railway Labor Act enacted by Congress in 1934.

That Act set up the National Railroad Adjustment Board for the "adjustment" of disputes between carriers and their employes arising out of contracts with respect to rules, rates of pay and working conditions. The Board is composed of a number of Divisions. The First Division consists of ten members, five selected by the railroads and five by the national railroad labor organizations. The Act designates the First Division as the one to hear disputes between the carriers and their train and engine service employes. (Complaint, Par. 19; R. 8.)

In accordance with the Board's practice, the First Division, upon receiving the claim of petitioner's yard employes, notified petitioner to file a statement of its position within 30 days, and thereafter fixed a date for the appearance of petitioner and the representatives of the employes. Under the Railway Labor Act (Section 3 First (i)), the Board was authorized to render an award at the request of one of the parties alone, and therefore petitioner was obliged to appear before the Board and separately state its contentions in opposition to the claims, at the risk of otherwise having an award or order of the Division entered against it by default. (Complaint, Pars. 19 to 22, inc.; R. 8.)

At the so-called "hearing" before the Division, witnesses could not be called and evidence could not be introduced because the rules of the Division forbade it. (Complaint, Ex. E; R. 40-43.) Thereafter, the Division was apparently unable to reach a decision because of the deadlock of its members, and, under the provisions of the Railway Labor Act (Section 3 First (l)), a Referee was appointed to sit with the Division and break the deadlock. In accordance with the Division's established practice, no opportunity was given petitioner to appear before the Referee or present to him written or oral arguments on the facts or the law. With the participation of the Referee, the Division decided the claim in favor of the employes, and, on October 24, 1938, it issued an "award" sustaining the claim. (Complaint, Pars. 24, 25, 26; R. 9.)

Petitioner, believing the award to be erroneous in point of law and not required by or in accord with the agreement of 1923, did not change its operating practices to conform to the award. Within a month after the date of the award respondents began to present, and have continued to present, claims and demands upon petitioner for sums of money that they allege they would have earned had they been permitted to perform the work which they claim they have a right to perform under the contract, but which is being performed by road-crews of the Tenant Lines. These claims for payments have been made notwithstanding the fact that many of respondents are and have been, during the period for which the claims are presented, actually engaged in performing yard work in and about the Terminal for which they are already receiving and have received full daily wages. Their demands amount to claims for wages which they contend they should be permitted to earn for performing work now being done by the road-crews of the Tenant Lines, in addition to the wages which they are actually earning. (Complaint, Par. 29; R. 11.)

The Railway Labor Act (Section 3 First (p)) authorizes a person for whose benefit an award by a Division of the Adjustment Board has been made to bring a proceeding to enforce the award in an appropriate United States District Court, within two years from the time the cause of action accrues under the award. No suit on the award in question has been instituted against petitioner. The Railway Labor Act makes no provision for a statutory method whereby the carrier against whom an award has been made by the Board can invoke the jurisdiction of the courts to determine the validity or legal effectiveness of the award.

The demands of respondents, if conceded in full by petitioner, would require the payment by it of a total amount of approximately $80,000 a year. Petitioner, in addition to being pressed by respondents for payment,

was confronted with the dilemma of having to decide between complying at once with the award and thereby waiving all opportunity for judicial determination of its rights and obligations under the contract of 1923, on which the award was purportedly based, or waiting until such time as respondents might choose to sue on the award, in which event petitioner might be compelled to pay the full amount of wages claimed by respondents for work not performed by them, up to the time of suit, in addition to the wages paid to other employes for performing that work. (Complaint, Pars. 28-32; R. 10-13, 57.)*

In other words, if the carrier, faced with an award against it of the kind involved in the present suit, should refuse to comply with the award and at the same time had no opportunity for initiating a proceeding for judicial determination of its obligations under the contract on which the award was purportedly based, the employes might wait until the last day of the two-year period before bringing an enforcement suit, in which event, if the enforcement suit were successful, the carrier would be obliged to pay for all the work in question done during the two-year period, as well as for the work done prior thereto since the presentation of the employes' claims, and to pay twice over for such work—once to the employes who in fact performed the work and a second time to the claimants who claim the right to perform the work but did not in fact do it. These circumstances would inevitably constitute a steadily increasing pressure on the carrier to comply immediately with the award by changing its oper-

* The fact that petitioner does actually pay for the services of the road crews in performing this work, in the form of reimbursement of the Tenant Lines whose employes the road crews are, is admitted by respondents in their Answer filed in the District Court below, where respondents, speaking of the services of the road crews of the Tenant Lines in moving empty and loaded cars in petitioner's yards, said: "* * * periodically the plaintiff is required to pay, and does pay to the Tenant Lines, sums equal to the reasonable value of said services" (R. 57). See also discussion in Judge Stephens' dissenting opinion (R. 367), answering discussion in the opinion of the majority of the Court of Appeals (R. 343-44).

ating practices and thereby reducing the damages to the amount of back wages accruing to the claimants up to the date of such change.

The experience of rail carrier-employers generally under the Railway Labor Act indicated that respondents would not sue promptly or at all on the award but would allow the full pressure of the circumstances to operate, reinforced by exertion of their own economic power, through threat of a strike, for the purpose of obtaining from the carrier full compliance with the award without a judicial determination of the basic rights and liabilities of the parties under their contract.*

Accordingly, petitioner, being desirous of having its rights under the contract judicially determined and having no other method open to it of achieving that result, instituted this suit under the Declaratory Judgments Act to obtain a judicial determination and declaration of its rights and liabilities under the contract of February 1, 1923. (Complaint, Par. 33; R. 13.)

Respondents, in the first defense set up by their answer, alleged that the complaint failed to state a cause of action. In the second defense of their answer, respondents contended—apparently because the complaint showed on its face the proceedings before the Adjustment Board—that:

> "(1) The Complaint fails to show the existence of an actual controversy between the plaintiff and the defendants.
>
> (2) The Complaint affirmatively shows that there exists a remedy especially provided by statute for this type of case.
>
> (3) The Complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure a judicial review of a decision of an administrative Board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act.

* See below, pp. 22-28.

(4) The Complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff." (R. 55.)

On the grounds thus alleged in the first and second defenses, the District Court, treating these defenses as a motion to dismiss, entered an order dismissing the complaint (R. 326). Petitioner appealed to the Court of Appeals, and that Court, after considering the case for nearly two years, affirmed the District Court in an opinion by Rutledge, *J.*, with Stephens, *J.*, dissenting (R. 331-81; 124 F. (2d) 235-77).

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred:

(1) In holding that Section 3 First (p) of the Railway Labor Act is to be construed, despite the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, where such a proceeding would otherwise be appropriate;

(2) In holding that Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer, with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment

Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes;

(3) In holding that the construction given by it to the Railway Labor Act, to the effect that the unilateral submission of such a dispute by the employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the courts to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Act, is not an unreasonable construction and is not inconsistent with the reasoning of this Court in *Moore* v. *Illinois Central R. Co.*;

(4) In holding that a construction of the Railway Labor Act which prevents the granting of the relief here sought by petitioner does not render that Act of doubtful constitutionality; and

(5) In affirming the judgment of the District Court below.

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals below, from which Judge Stephens dissented, should be reversed by this Court because:

1. The construction placed upon the Railway Labor Act, and particularly Section 3 First (p) thereof, by the majority of the Court of Appeals below is unwarranted and unreasonable, in that, although unsupported in the legislative history or the language of the Act or in any authoritative interpretation or statutory analogy, it nevertheless gives to the Act an operation which, under the facts in the case at bar, has the effect of compelling the carrier to submit to the method of "adjustment" provided therein—although clearly not intended by Congress to be a system of compulsory arbitration—and also of com-

pelling the carrier to accept as final, and to comply with, an award against it by the Adjustment Board—admittedly a non-judicial body—without any opportunity for a judicial determination of its legal rights and liabilities under the contract on which such award is purportedly based.

2. The present proceeding is an appropriate one for the exercise of declaratory judgment jurisdiction, in the absence of some statutory impediment thereto.

3. No such statutory impediment is presented by the Railway Labor Act. The majority of the Court of Appeals below are in error in concluding that to permit the maintenance of a suit like the present one would deprive the employes of advantages which Congress intended them to have under Section 3 First (p) of the Railway Labor Act, and for the preservation of which the procedure provided in that Section must, in the view of the majority below, be regarded as exclusive of any other method of obtaining a judicial determination of the rights and liabilities of the parties under their contract. The truth is that the institution of a proceeding like the present one does not in fact or in law prevent the employes from obtaining any advantages which Congress may have intended them to have by such a suit.

4. The decision of the majority of the Court of Appeals below, by construing the Railway Labor Act so as to give it a compulsory operation, is in conflict with the reasoning and decision of this Court in *Moore* v. *Illinois Central R. Co.*, wherein it was held that the procedure provided by the Railway Labor Act for the adjustment of disputes arising out of contracts between carriers and their employes was not intended to be compulsory or exclusive but was intended to be a voluntary system of adjustment.

5. The construction placed upon the Railway Labor Act by the majority of the Court of Appeals below is not to be adopted if an alternative construction is available, because it would render that Act of doubtful constitutionality, in that its practical operation would be to deprive petitioner of any opportunity for a judicial determination of its rights and to compel it in fact to be bound by the award of a non-judicial body, to wit, the Adjustment Board.

6. Even if the Adjustment Board is for the purpose of argument conceded to be a public quasi-judicial or administrative tribunal—which petitioner insists it is not—nevertheless the policy established by this Court in its recent decisions, especially in *Rochester Telephone Corp.* v. *United States*, disposes of the contention that the issues determined by the Board should not be subject to judicial review and makes it clear that the declaratory judgment procedure is appropriate for securing such review.

7. To allow the judicial relief sought in this proceeding would not, as respondents contend, render the provisions of the Railway Labor Act unworkable, and is not forbidden by the "policy" of that Act.

ARGUMENT.

I. The Decision of the Majority of the Court of Appeals Below Places an Unwarranted and Unreasonable Construction Upon the Railway Labor Act, in That It Gives to That Act an Operation Which, on the Facts of This Case, Compels a Carrier to Submit to the "Adjustment" by a Non-Judicial Body of Its Legal Rights and Obligations Under a Contract With Its Employes, and After Such Adjustment Deprives the Carrier of Any Real or Effective Opportunity for a Judicial Determination of Such Rights and Obligations..

The decision of the majority of the Court of Appeals below holds that, where employes, without the consent or

concurrence of the carrier-employer, have submitted a dispute arising out of the interpretation of a collectively bargained agreement to the National Railroad Adjustment Board for "adjustment," thereafter the doors of the judicial courts are closed against the carrier-employer, nor may it have a judicial interpretation of its rights and obligations under such agreement, save at the election of the employes, who have no incentive to and in fact never do elect to seek such judicial interpretation. This is the plain and inescapable conclusion from reading the decision below, together with the provisions of the Railway Labor Act, in the light of the facts of the present case.

The Railway Labor Act of 1934 created the National Railroad Adjustment Board as a means of "adjusting" disputes arising out of contracts between carriers and their employes concerning rules, rates of pay and working conditions. After the possibilities for settling such a dispute through negotiation and discussion have been exhausted, the dispute may (Section 3 First (i)) be submitted to the Board either by both parties acting jointly or *by either party separately.* In a case where the Board has made an award, the Act provides in Section 3 First (p) for a method of judicial determination, on the initiative of the employes, of the rights and liabilities on which such award is purportedly based. No method for such judicial determination on the initiative of the carrier-employer is provided, but there is nothing in the Act or in its legislative history (see pages 33, 84-85 below) which purports to deny to the carrier-employer any right of action or recourse to any procedure which would otherwise be open to such employer—as, for example, a suit for a declaratory judgment.

The majority of the Court of Appeals below, however, has held in the case at bar that such a denial of the carrier's right to a judicial determination must be read into the Act, with the result that to all practical intents and purposes an award of the Adjustment Board in favor of

the employes becomes final against the carrier, without opportunity for judicial determination of the rights and duties on which the award is based, save at the election of the employes themselves. Moreover, for good and sufficient reasons, as shown below (pages 22-28), the employes have no incentive to make such election and in fact never do.

Petitioner submits that such a construction of the Act, in the absence of an express indication that it is required, is unreasonable and unwarranted, in view of the fact that the National Railroad Adjustment Board is not a judicial or quasi-judicial body, and in view of the further fact that such a construction of the Act, by barring the carrier-employer from access to judicial relief, exposes it to the cumulation of such severe penalties and to the exertion of such effective economic pressure from the employes as to compel it in fact to comply with the Adjustment Board's award, irrespective of the legality of the award.

A. The National Railroad Adjustment Board is not Entitled to be Regarded as a Judicial or Quasi-Judicial Tribunal, in View of the Manner in Which it is Constituted and the Nature of its Procedure.

The National Railroad Adjustment Board, because of the way in which its members are chosen and compensated and because of the procedure which it follows, cannot be regarded as a judicial or quasi-judicial tribunal (like the Interstate Commerce Commission, the Federal Communications Commission or similar bodies), whose adjudications may under some circumstances foreclose certain issues decided from being re-examined in a court of law. In the first place, the Board is not, and under the Act is not intended to be, a body of public administrative officials compensated from the public treasury. The Act provides (Section 3 First (a)) that the Board shall consist of members, half of whom are selected by the carrier and

half by such organizations of employes, nation-wide in scope, as have been or may be organized in accordance with the provisions of Section 2 of the Act. It is further provided (Section 3 First (g)) that "each member of the Adjustment Board shall be compensated by the party or parties he is to represent."* In this respect the Board is of course an altogether different type of body from a quasi-judicial tribunal like the Interstate Commerce Commission, whose members are appointed by the President and paid from the United States Treasury. The very phrase "to represent," used in the language just quoted from Section 3 First (g), in itself shows a Congressional view that members of the board do not sit in a judicial or quasi-judicial capacity but instead function as partisan *representatives* of the party or parties by whom they are compensated.

In the second place, the procedure followed by the First Division of the Adjustment Board is not that of a judicial or quasi-judicial body. Under the Act (Section 3 First (i)), the Board may render an award on the submission of one of the parties alone, without the joinder or appearance of the other party. If the carrier does appear, it is required by the First Division to answer the claim without seeing the "submission"—*i. e.*, the statement of its adversary's position—which is presented to the Board, and thus without having notice of the basis of the claim which must be answered. (Complaint, Par. 20, Ex. E; R. 8, 41-42.) At the so-called "hearings" before the Division, no witnesses are called to testify and no evidence

* The Act does provide that, where a referee is called in for the purpose of breaking a deadlock among the members of the Board, such referee shall be paid by the Mediation Board, which is a governmental agency (Section 3 First (1)). However, a referee who is thus called in for particular cases is not a regular member of the Adjustment Board, and is not a specially trained administrator, "informed by experience" of the specialized character which is found in the case of a member of the Interstate Commerce Commission, for example. (See *Illinois Cent. etc. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 454 (1907).) Furthermore, his vote is only one of the votes which decide the case.

is introduced as to the facts relied on by the claimants; *ex parte* allegations are received by the Division as proof, without any opportunity to the parties for cross-examination or other means of testing the truth of the allegations. (Complaint, Pars. 22-23; R. 8-9.) No record, stenographic or other, is made of the hearing. (Complaint, Par. 23; R. 9.) If the Division is unable to reach a decision because of a deadlock among its members—as was the situation in the present case—a referee is called in under the provisions of the Act (Section 3 First (1)), and the referee joins in the decision of the case without hearing evidence and without any argument, written or oral, from the parties. (Complaint, Pars. 24-25; R. 9.) Finally, the award of the Division contains no findings of fact or conclusions of law, and in fact does not constitute an opinion in any proper sense. (See so-called "findings" and award in present case—Complaint, Par. 26; R. 9.)*

Clearly, this procedure is wholly unlike that followed by the Interstate Commerce Commission and other quasi-judicial tribunals. That the Adjustment Board is neither constituted nor operated as a judicial or quasi-judicial body has been freely admitted by the respondents in their briefs in the courts below (R. 86-87, 131). For example:

> "Both in personnel and in organization this Board departs somewhat from traditional *judicial* concepts. Judicial tribunals are non-partisan and the litigant is protected in his cause by the impartiality of the judge. The Adjustment Board is bi-partisan rather than non-partisan, and one appearing before it is protected by the fact that half of its members are predisposed in his favor. If he can maintain this advantage and, in addition, secure the approval of one or more members whose natural predisposition is

* Fuller details respecting the procedure of the Adjustment Board, showing that its procedure is as described above, are set forth in the monographs of the Attorney General's Committee on Administrative Procedure. See "Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board," compiled by "Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board," especially pp. 80-113, 224-248, 258-288, 290-349.

against him, his cause must surely be just and he will prevail." (Defendants' Memorandum Brief, p. 20, R. 86.)

And again:

"A judge *decides* the case before him, while, as its name implies, this Board is intended to adjust matters submitted to it. 'Compromise' judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created." (Defendants' Memorandum Brief, p. 21, R. 87.)

Respondents have thus admitted that the Adjustment Board does not act judicially:

"Its own organization is not that of a non-partisan judicial tribunal, but of a bi-partisan conference group. Its function is to adjust, to compromise, to settle, rather than to judge the disputes which come before it." (Defendants' Memorandum Brief, p. 65, R. 131.)

Indeed, respondents have gone so far as to state in their briefs below that the function of the Board is not the judicial one of interpreting and applying the basic agreement between the parties, out of which the dispute arises, but rather that of making new arrangements—in other words, a new agreement—between the parties if in the judgment of the Board such new arrangements are essential to a proper continuance of the parties' future relationship (R. 132-133). Thus, respondents have said:

"* * * *The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement.* The full significance of this distinction will be more apparent, we believe, when we consider

the nature of the decision which the Board is empowered to make in relation to a dispute before it.

"*The function of a court is to render a judgment between parties who are before it as litigants.* Such a judgment has the effect of establishing the parties' present rights. *With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary.* It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"*In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts.* The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but *the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption.*" (Defendants' Memorandum Brief, pp. 66-67, R. 132-133.) (Emphasis supplied.)

In view of these facts, and the admissions thus made by respondents, it is quite clear that the Adjustment Board is in no sense a judicial or quasi-judicial tribunal, with respect to its intended function, its composition, or its operation. And yet, the decision of the majority of the Court of Appeals below construes the Railway Labor Act so as to give it the effect of depriving a carrier in petitioner's position, who has been compelled by the em-

ployes' unilateral submission to be subjected to the issuance of an award against it by this non-judicial body, of any opportunity for a judicial determination of its rights and liabilities under its contract, save at the will of the employes in a suit brought to enforce such award under Section 3 First (p) of the Act. The result of that situation is that the carrier is forced by economic pressure to abide by the award of the non-judicial body without any judicial determination of its rights.

B. Under the Decision of the Majority of the Court of Appeals as Applied to the Facts of This Case, the Railway Labor Act Operates in Such a Manner as to Impose Upon the Carrier a Compulsory Method of Adjustment of Disputes With its Employes, and Deprives the Carrier of Any Opportunity for a Judicial Determination of its Rights and Liabilities.

Since the Railway Labor Act makes it possible for employes to submit a dispute to the Adjustment Board entirely without the consent of the carrier, it follows that if, after such a unilateral submission and the issuance of an award favorable to the employes, the carrier is denied—as it is under the decision of the majority below—the opportunity of obtaining a judicial determination of its rights except in a suit brought by the employes under Section 3 First (p) of the Railway Labor Act, then the carrier is in effect deprived of an opportunity to have its contract rights judicially determined, save at the option of the employes. But the fact is plain that it is not to the employes' interest to bring such a suit under Section 3 First (p), because, when an award is of such doubtful legality that it would probably not be sustained by a court, they can obtain compliance with the award as a result of the economic pressure of the circumstances and of their own economic power, which pressure ordinarily is sufficient to compel the carrier to com-

ply with the award.* The consequence is that the carrier is in effect compulsorily deprived of any opportunity for a judicial determination of its rights under the contract on which the award is purportedly based.

The fact that the adjustment procedure set up under the Act does as a practical matter operate in this compulsory way upon the carrier is clearly demonstrated by the circumstances of the case at bar.

The record shows that, when efficiency and promptness of operation require it, it is petitioner's present practice to employ the road-crews to do the work in question. (Complaint, Par. 10; R. 5-6.) It is not only petitioner's right but it is also in the public interest that petitioner's operations should be conducted in the most efficient and expeditious manner possible. Imposition upon petitioner of the requirement that the work in question should be done by respondents, in accordance with their claim and in place of petitioner's present practice, would on the allegations of the complaint—which must be taken to be admitted for the purpose of this stage of the proceeding—interfere with and impair the efficiency of petitioner's operations. The award of the Adjustment Board, in sustaining respondents' claim, requires in effect that petitioner change its operating practices in this respect, so as to permit respondents to do this work. Furthermore, the award, if complied with, requires that respondents be paid full wages for each day that they have not been permitted to do the work, subsequent to the presentation of their claims.

When a carrier in petitioner's position is faced with such an award of the Board as that sustaining respondents' claim, it has two alternatives before it. On the one hand, it can immediately comply with the award and change its operating practices so as to permit respondents to do the work. If it does so, it will be sacrificing its own interests, and also the public interest in efficiency of

* See below, pp. 26-28.

operation, without any judicial determination as to whether or not it is legally obliged to do so. On the other hand, it can refuse to comply with the award and continue its practices as they were before the award. But if it adopts the latter alternative, each additional day on which it continues to refuse to permit the employes to do the work will add to the amount which it will have to pay to them if it should be ultimately determined that the award of the Board rests upon a proper construction of the contract, and at the same time on each such additional day the carrier must continue to pay the employes who actually do the work. For example, if it adopts this second alternative, it may so happen that, on the 364th day of the second year following issuance of the Board's award, it will be confronted with a suit under Section 3 First (p) of the Railway Labor Act, which suit might, if the Board's award is upheld, result in the carrier's being compelled to pay back wages to the claimant employes for 728 more days' wages than would have been the case if the carrier had complied with the award on the day following its issuance, in addition to having paid the employes who actually did the work during all of that time (see pages 9-10 above).

In other words, the total cost to the carrier in connection with the dispute in question would be very much less if it sacrificed its right to a judicial determination of the issues and complied promptly with the Board's award than the cost would be if it refused compliance and was ultimately compelled to yield to the employes' demands by suit brought at the last possible moment under the Railway Labor Act. If a carrier in petitioner's position is to be denied declaratory relief in a proceeding like the present one, there is no way for it to avoid the risk of having ultimately to pay the much larger sum, except by prompt compliance with the award. It is obvious that, under such circumstances, the passage of time following the Board's award, and the consequent

mounting of the sum which the carrier may ultimately have to pay, operates to increase continually the pressure on the carrier to comply promptly with the Board's award. The result thereof would be to force the carrier to impair the efficiency of its operation, without a judicial determination as to whether or not it is legally obliged to do so.

Still more importantly, in addition to this pressure created by the circumstances of the situation, the organizations of the employes are always in a position to exert, and do in fact frequently exert, the full pressure of their economic power, through threat of a strike, to compel compliance with awards of the Board. This was admitted by respondents in their brief in the District Court below, where they said: "The orders of the Board find their primary sanction in the *collective economic bargaining power of the employees*" (R. 103). (Emphasis supplied.)* It is a well known fact that under modern conditions carriers are held primarily responsible by public opinion for the maintenance of undisturbed transportation operations, and this is a responsibility which carriers cannot afford to disregard. The threat of a strike directly impedes the proper discharge of this responsibility in such a way that it creates a serious and effective pressure upon the carrier to comply with the employes' demands, and so constitutes a weapon which can seldom be ignored or defied. Of course it is true that the Railway Labor Act provides for the appointment of an Emergency Board by the President in the case of a threatened strike, and prohibits any change in the *status quo* during the consideration of the dispute by such Emergency Board and for a period of thirty days thereafter.† However, this additional procedure provides no relief for the carrier, since there is nothing in the law to prevent the employes from renewing the pressure of their economic power after the expiration of thirty days following the decision of the Emergency Board, in the

* See also below, p. 27.

† Act of May 20, 1926, c. 347, sec. 10, 44 Stat. 586-87, 45 U. S. C. 160.

event that they do not like that Board's decision.* Moreover, resort to the Emergency Board procedure serves merely to prolong the delay which of itself operates to compel compliance with the award, and contains no more assurance of an ultimate judicial determination of the rights of the parties than does the procedure before the Adjustment Board. The function of the Emergency Board is not to determine judicially the legal rights and liabilities of the parties under the contract but merely to endeavor to find some method of settling the dispute, if possible.

These circumstances mean that, if declaratory relief is to be denied to a carrier in the position of petitioner in this case, employes having a dispute with the carrier may first compel a submission of the dispute to the Adjustment Board, without any consent on the part of the carrier, and may thereafter by economic pressure compel the carrier's compliance with an award by the Board in the employes' favor, without any judicial determination of the rights and liabilities of the carrier under its contract with the employes. The fact that the Railway Labor Act does in practice actually thus operate to compel compliance by carriers with awards by the Board against them is demonstrated by the almost complete absence of suits under Section 3 First (p) to enforce awards against carriers. The opinion of the majority below shows that, according to statistics available in 1938, out of a total of 3,134 decisions rendered by the Board up to that time, the claims against the carriers were sustained in full in 1,745 cases and in part in 394 additional cases—altogether, nearly two-thirds of the total (R. 336, note 11; p. 242 of 124 F. (2d)). And yet there were only two cases in which

* The events of the nation-wide wage controversy late in 1941, between the rail carriers and the employes' organizations, of which this Court may take judicial notice, wherein the employes' organizations refused to accept the decision of the Emergency Board appointed by the President and publicly announced they would call a strike unless that decision were modified, illustrated the possibility of a threatened strike against a decision of an Emergency Board not acceptable to the employes' organizations.

a judicial determination was had of the rights of parties thus concerned with an award of the Adjustment Board. One such case is cited by the majority below (R. 342, note 24; p. 246 of 124 F. (2d)), as the only case discovered of an enforcement suit under Section 3 First (p) of the Act: *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5th, 1937). Another case of judicial review of Adjustment Board action is cited in Dean Garrison's article, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale L. J. 567, at p. 592 (an article which is referred to several times by the majority below), viz., *Griffin* v. *Chicago Union Station Co.*, 13 F. Supp. 722 (N. D. Ill., 1936). In this connection, the following passage from Dean Garrison's article is worth noting (pp. 591-92):

> "The Board has no powers of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance. This the union can do in two ways: first, by petitioning the appropriate United States District Court for an order enforcing the Board's award, pursuant to the procedure laid down by the statute; and secondly, by economic pressure. *The first course has not been adopted.* Out of 1,616 awards handed down by the four Divisions up to July 30, 1936, of which considerably over half must have been in favor of the employees, not one was taken to court for an enforcement order, and *the presumption is either that the carriers willingly complied in all these cases, or that, in some of the cases where the carriers did not at first comply, compliance was brought about by threatened strikes.*
>
> "The net result is that, with one exception, *no judicial review of the Board's capacity, procedure or decisions has been had, and none is likely to be had.*" (Emphasis supplied.)

It follows from what has been said, that the decision by the majority of the Court of Appeals below, denying to petitioner an opportunity for declaratory relief with respect to the issues on which the Adjustment Board's award against it purports to be based, construes the Railway Labor Act in such a manner as to permit it to operate, in connection with the economic pressure of the circumstances and of the employes' bargaining power, so as to impose on a carrier in petitioner's position a compulsory method of adjustment of disputes with its employes and to deprive the carrier of any opportunity for a judicial determination of its rights and liabilities with respect to such disputes

II. The Present Proceeding is an Appropriate One for the Exercise of Declaratory Judgment Jurisdiction, in the Absence of Some Statutory Impediment Thereto.

In view of the circumstances related above, it is clear that, in the absence of some statutory impediment, the present case is an appropriate one for the exercise of declaratory judgment jurisdiction, under the Federal Declaratory Judgments Act. Under that Act, the Courts of the United States have power "in cases of actual controversy * * * to declare rights and other legal relations of any interested party petitioning for such declaration whether or not further relief is or could be prayed." (See page 2 above.) The applicability of that Act to the present case is so fully and convincingly demonstrated in the opinion of Judge Stephens below (R. 358-66) that there is no need for elaborate discussion of it here. It is sufficient to point out that the facts of the case, as stated in petitioner's complaint (which facts must be taken as admitted upon the present motion to dismiss) clearly show that the case presents an actual controversy, consisting of specific claims for money made by respondents and refused by petitioner. (Complaint, Par. 29; R. 11.) Moreover, the demands of respondents are made, as re-

spondents have admitted,* under and on the basis of the contract between the parties, and not under the Board's award. The case is thus one of "actual controversy" with respect to the "rights and other legal relations" of petitioner and respondents under the contract between them. In such a situation a declaratory judgment proceeding initiated by the party defending against the claim is appropriate for determination of the rights of the parties, even though the claimant has available another procedure by which he could seek enforcement of his claim but to which he does not resort; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461 (1937).

Furthermore, the circumstances of the present case, whereby a carrier in petitioner's position is subject to increasing economic pressure toward compliance with the employes' demands, make declaratory relief not only an appropriate but a necessary remedy. As shown above, if the carrier refuses to comply with the award and takes no action, it incurs the risk of being ultimately compelled to pay much larger sums than it would if it complied promptly; while on the other hand, if the carrier submits itself to the award and complies promptly therewith, it sacrifices its right to a judicial determination of its obligations under the contract between it and its employes. The only solution to the dilemma in which the carrier thus finds itself is to obtain as promptly as possible a judicial determination of its rights and liabilities under the con-

* Thus, in their brief in the District Court below (included in the record of the Court of Appeals below and in the record filed herewith), respondents stated:

> "These claims, however, *are based upon the Agreement of 1923—not upon the order of the Board*" (R. 117). (Emphasis as in respondents' brief below, p. 51.)

Again, in the same brief (p. 53):

> "When the individual defendants presented to the plaintiff, individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order which has no substantive effect and is in itself unenforceable * * *. *The plaintiff today is in exactly the same position as to its substantive rights and obligations as it was before the order was issued*" (R. 119). (Emphasis supplied.)

tract. Since the employes refuse to bring suit under Section 3 First (p) of the Act, and since the carrier has no other method of obtaining a judicial determination of its rights and obligations under the contract between it and the employes, a declaratory judgment proceeding becomes the only means available to petitioner for obtaining such necessary relief. If declaratory relief is granted and the carrier is thereby presently advised of its rights and obligations, it could if necessary change its operating practices promptly in response to an ultimate determination against it by the courts, and thus save itself from a substantial portion of the heavy penalty payments demanded by respondents. As stated by Judge Stephens in his dissenting opinion below (124 F. 2d at page 259; R. 356):

> "In *Aetna Life Ins. Co.* v. *Haworth, supra,* the mere increase in the amount of insurance policy claims through the accrual of interest, and the inconvenience of having to be prepared to meet the claims at some future time, were held sufficient grounds for declaratory relief in respect of legal rights and obligations arising under insurance contracts. *A fortiori* the uncertainties and hazards to which the appellant under the facts stated in the instant case is subjected are sufficient to invoke exercise of declaratory jurisdiction. In *E. Edelmann & Co.* v. *Triple-A Specialty Co.,* 88 F. 2d 852, 854 (C. C. A. 7th, 1937), Lindley, District Judge, speaking for the court, said, in respect of the purpose of the Declaratory Judgments Act:
>
> "'*It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued*'." (Emphasis supplied.)

The language thus quoted from the *Edelmann* case is exactly applicable to the situation in the present case.

Moreover, its soundness is substantiated by the legislative history of the Declaratory Judgments Act. In recommending passage of the Act, the Judiciary Committee of the Senate said (Senate Report 1005, 73d Congress, Second Session, 1934):

> "It enables disputes arising out of written instruments, or otherwise, to be adjudicated without requiring a destruction of the *status quo* and of the social and economic fabric. *Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed.*" (Emphasis supplied.)

Clearly, in view of the purpose of the Declaratory Judgments Act, as thus revealed in its legislative background and judicial interpretation, the present case is an appropriate one for declaratory relief, particularly in the light of the facts establishing the special need for such relief in this case. Nor can there be any question about the propriety of declaratory relief for the determination of rights and obligations under collective bargaining agreements such as that involved in this case. Both before and since the enactment of the Railway Labor Act of 1934, declaratory relief has been regarded by the courts as an appropriate remedy with respect to disputes arising out of contracts between carriers and their employes.* Finally, resort to a declaratory judgment proceeding is not barred, in a case of this kind, by the authorities which hold that such a proceeding may not be used in some circumstances to review the decision of another judicial or quasi-judicial tribunal, since that rule clearly does not contemplate awards of a body like the National Railroad Adjustment Board, which, as shown above (pp. 17-22), is

* See for example *Piercy* v. *L. & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1932); *Burton* v. *Or.-Wash. R. & N. Co.*, 148 Ore. 648, 38 P. 2d 72 (1934); *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749 (1936).

not constituted and does not operate in a judicial or quasi-judicial manner and is not in any sense such a tribunal. Even if it were properly to be regarded as a quasi-judicial or administrative tribunal or agency, this Court has now determined that, in the Federal courts at least, declaratory judgment jurisdiction may be exercised to review administrative action and to determine the rights of a party adversely affected by such administrative action: *Perkins* v. *Elg*, 307 U. S. 325, 59 S. Ct. 884 (1939).* (See discussion below, pp. 73-74.)

The majority of the Court of Appeals did not deny that the present controversy would be an appropriate one for the exercise of declaratory judgment jurisdiction in the absence of special statutory impediment. However, the majority below took the position that Section 3 First (p) of that Act must be construed as manifesting a Congressional intent that the procedure provided for therein should be exclusive of all other methods of judicial determination of the rights of the parties.

III. There is No Statutory Impediment to the Exercise of Declaratory Judgment Jurisdiction in This Case.

As stated above, the majority of the Court of Appeals below have concluded that there is a statutory impediment which prevents the exercise of declaratory judgment jurisdiction in this case, in that Section 3 First (p) of the Railway Labor Act must, in the view of the majority below, be construed to exclude any other proceeding, such as the present one, for the judicial determination of the rights and liabilities of the carrier and its employes under their contract. The reason advanced by the majority

* In that case, a declaratory decree establishing the petitioner's status as a citizen of the United States was rendered against the Secretary of State, the Secretary of Labor, and the Commissioner of Immigration and Naturalization, thereby in effect reversing the administrative action taken by those officers, who had ruled that petitioner was not a citizen.

below for this conclusion is that such construction is essential in order to preserve to the employes certain advantages under the Act which Congress must have intended them to have. Moreover, respondents have claimed that Section 3 First (p) of the Railway Labor Act must be thus construed as providing an exclusive remedy, because similar language in other statutes, viz., the Interstate Commerce Act and the Packers and Stockyards Act, has been so construed by the Courts. Petitioner submits that both of these contentions are unsound and are based on erroneous premises.

A. It is Erroneous to Conclude, as Does the Majority Below, That Section 3 First (p) of the Railway Labor Act Must, in Order to Preserve to the Employes Advantages Thereunder which Congress Intended Them to Have, be Construed to Exclude Any Other Proceeding, Such as the Present One, for the Judicial Determination of the Rights and Liabilities of the Carrier and Its Employes Under Their Contract.

It is not claimed by the majority of the Court of Appeals that there is anything in the legislative history of Section 3 First (p) of the Railway Labor Act to indicate that it was intended to be exclusive of all other methods of judicial determination of the rights of the parties, and such a claim could not successfully be maintained, because no reference whatever to Section 3 First (p) is to be found in the reports of legislative consideration given the Act in the Houses of Congress.* Moreover, there is no language in the Act itself which indicates that the procedure under Section 3 First (p) was intended to be exclusive. The majority below do, however, conclude that an intent on the part of Congress that the procedure under Section 3 First (p) should be exclusive must be inferred by implication from the provisions of that Sec-

*See House Report No. 1944 and Senate Report No. 1065, 73d Congress, Second Session, discussed more fully at pp. 84-85 below.

tion. The reason advanced by the majority for arriving at this conclusion is that the method of judicial determination provided in Section 3 First (p) gives to the employes certain definite advantages which Congress must have intended them to have and to retain unimpaired. The intent of Congress to secure these advantages to the employes would be frustrated, the majority below conclude, if the carrier of its own motion were permitted to seek judicial determination of its rights under the contract*

The basis for this conclusion of the majority is apparently that the advantages in question flow from the fact that in a proceeding under Section 3 First (p) the employes occupy the position of plaintiffs, and that if the carrier were permitted to maintain such a suit, as in the case at bar, the employes would lose the advantages accruing from their status as plaintiffs in a proceeding under Section 3 First (p), such as the advantage of the right to select the forum in which the suit is to be brought, from the relatively wide range of districts specified in the Act, and the advantage of selecting the time when the suit is brought.

If the underlying assumption on which this conclusion is founded is a sound assumption, viz., that the declaratory judgment procedure is not available when its effect would be to deprive the opposite party of procedural advantages which such party would otherwise have, the consequence would be to defeat every declaratory judgment proceeding, since in every such proceeding the party against whom declaratory relief is sought, and who would otherwise have the initiative, is deprived of the advantages which accompany that initiative, including the choice of venue and forum and of the time of bringing suit. Clearly, no such argument is tenable. This Court has held that the advantages which accompany the right of a beneficiary under

* See discussion in majority opinion below (R. 333-38; pp. 239-44 of 124 F. (2d)).

an insurance policy, for example, to bring suit against the insurer in order to enforce the policy do not defeat the right of the insurer to institute a proceeding for a declaratory judgment to determine an existing controversy with respect to the policy, in the absence of an actual suit by the beneficiary on the policy: *Aetna Life Ins. Co.* v. *Haworth, supra.*

There is an even stronger answer to the conclusion of the majority of the Court below on this point. The majority assumes that, if the present suit were permitted, the respondents would be deprived of the advantages which would accrue to them as plaintiffs in a proceeding under Section 3 First (p). This is not the case. The majority below have apparently assumed it to be the case, because they have made the fundamental mistake of failing to realize that the institution and pendency of a declaratory judgment proceeding, like the present suit, do not in any way bar the employes, in whose favor an award has been issued, from instituting suit under Section 3 First (p) and thereby securing for themselves all the advantages which would accrue to them as plaintiffs in such a suit. Under the governing principles and authorities it is clear that such a suit, if promptly instituted by the employes, could proceed to judgment, notwithstanding the prior institution of the declaratory judgment proceeding.

There are only two ways in which the prior institution of a declaratory judgment proceeding could conceivably interfere with a subsequent suit by the employes under Section 3 First (p), and in neither of these ways would the declaratory judgment proceeding have such an effect:

1. The existence of the previously instituted declaratory judgment suit might conceivably be regarded as constituting a bar to the second suit so as to cause the court having jurisdiction of the second suit to abate that suit pending final determination of the prior suit; but the decided cases have held otherwise.

2. The court having jurisdiction of the first suit might proceed in such a manner, *e. g.*, by enjoining the parties from prosecuting the second suit or by pressing its own suit to judgment—as to nullify the practical effectiveness of the second suit; but, again, this possibility is eliminated under established principles.

Under the decided cases it is clear that a suit begun by an employe or employes under the provisions of Section 3 First (p) of the Railway Labor Act to enforce an award of the Adjustment Board, subsequent to the institution by the carrier of a proceeding for a declaratory judgment, as in the present case, would in no way be barred or interfered with by the institution of the prior declaratory judgment suit.

1. *A Proceeding Such as the Present One Would Not Bar a Suit Subsequently Brought by the Employes Under the Provisions of Section 3 First (p) of the Railway Labor Act.*

It is well established by the cases that the fact that one court has assumed jurisdiction of a particular cause of action does not preclude another court from entertaining a suit involving the same subject matter except in the case of actions *in rem* or *quasi in rem*. This rule is set forth and is discussed at length in the decision of this Court in *Kline* v. *Burke Const. Co.*, 260 U. S. 226, 43 S. Ct. 79 (1922). In that case the construction company brought an action for breach of contract in a Federal court, the ground of jurisdiction being diversity of citizenship. Thereafter the defendants in that action instituted a suit in equity against the construction company in a State court, seeking an accounting and judgment under the contract. The construction company then sought in

the Federal court to enjoin further prosecution of the equity suit subsequently brought in the State court. The Supreme Court, in holding that such an injunction was properly refused by the District Court, pointed out that the injunction would have been proper to preserve the jurisdiction of the prior court over the *res* of the suit if there had been such a *res*, and then went on to say (p. 230 of 260 U. S.):

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. * * * *The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.*" (Emphasis supplied.)

This principle has been directly applied to a situation closely analogous to the present one, in *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28 (C. C. A. 8th, 1939). There an insurance company instituted proceedings in a Federal court for a declaratory judgment of its rights and liabilities under certain insurance policies. In its petition the company included a request that the defendants, beneficiaries under the policies, be enjoined from prosecuting in any other court an action on any of the policies in question during the pendency of the declaratory judgment proceeding. On appeal from a decree dismissing the bill, the Circuit Court of Appeals held, first, relying on *Aetna Life Ins. Co.* v. *Haworth*, *supra*, that

the case was a proper one for the exercise of declaratory judgment jurisdiction, and second, relying on *Kline* v. *Burke Const. Co., supra,* that the insurance company had no right to an injunction against the prosecution of suits by the beneficiaries in other courts. The court said (pp. 31-32 of 102 F. (2d)):

> "Where one court takes jurisdiction of an action *in personam* seeking a judgment for money only, it does not affect the right or the duty of another court to try and adjudicate the same cause of action. *Kline* v. *Burke Construction Company,* 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. The fact that the declaratory judgment law has given the alleged debtor the right to initiate the action to adjudicate the dispute over the contract for the payment of money only, does not call for the application of any different rule. *The beneficiaries under these policies may maintain actions at law on the policies for recovery of money only, notwithstanding the pendency of the company's suit to have it declared that the company is not indebted on account of the same policies.*" (Emphasis supplied.)*

* This rule has been followed in many other cases, among which the more recent ones, involving circumstances of the same character as those in the *Roe* case, are: *Aetna Casualty and Surety Co.* v. *Yeatts,* 99 F. (2d) 665 (C. C. A. 4th, 1938); *Maryland Casualty Co.* v. *Consumers Finance Service,* 101 F. (2d) 514 (C. C. A. 3d, 1938); *Central Surety & Ins. Corporation* v. *Norris,* 103 F. (2d) 116 (C. C. A. 5th, 1939); *Ballard* v. *Mutual Life Ins. Co. of N. Y.,* 109 F. (2d) 388 (C. C. A. 5th, 1940).

Of course these cases are to be sharply distinguished from the group of cases in which subsequent suits between the same defendants and the same plaintiffs involving the same issues have been enjoined in order to prevent harassment from multiplicity of suits. But even this *quia timet* jurisdiction of the courts of equity will not be exercised "unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation": *Boise Artesian Water Co.* v. *Boise City,* 213 U. S. 276, 29 S. Ct. 426 (1909). To like effect are *Matthews* v. *Rodgers,* 284 U. S. 521, 52 S. Ct. 217 (1932), and *Moor v. Texas & N. O. R. Co.,* 75 F. (2d) 386 (C. C. A. 5th, 1935).

Another group of cases which must be distinguished from the present case consists of those involving suits for infringement of patent rights, as for

In the same manner, the respondents in the present case may institute on their own initiative and maintain actions under Section 3 First (p) of the Railway Labor Act, notwithstanding the pendency of a previously instituted suit, like the present one, to have the rights of the parties declared with respect to the same issues.

Clearly, therefore, a suit brought by the employes under Section 3 First (p) of the Railway Labor Act would not be barred by the existence of a prior suit for declaratory judgment, instituted by the carrier in another court, and the employes are accordingly free to begin such suit on their own initiative, for the purpose of securing whatever advantages may accrue to them therefrom.

Could the carrier, as party plaintiff in the prior suit, successfully apply to the court having jurisdiction of the second suit for a discretionary stay of the proceedings in the latter suit, on the ground of priority of the jurisdiction of the court in which the earlier suit was filed? The answer to this must of course be "no," for two reasons. In the first place, the cases and principles already reviewed show that no priority of jurisdiction is obtained by the suit which is filed first, where both actions are *in personam* and where there is no element of harassment. In the second place, the granting of a stay of proceedings already pending is a matter for the sound discretion of the court. Thus, in *Landis* v. *North American Co.*, 299 U. S. 248, 57 S. Ct. 163 (1936), this Court,

example, *Milwaukee Gas Specialty Co.* v. *Mercoid Corporation*, 104 F. (2d) 589 (C. C. A. 7th, 1939). A patent is in the nature of a *res*, in the sense that a suit for its infringement does not involve simply a personal liability but is concerned with issues as to the ownership of a particular device or thing. Accordingly, suits involving patent infringements generally fall within the exception to the general rule noted in *Kline* v. *Burke Const. Co.*, *supra*, whereby in the case of an action *in rem* or *quasi in rem* the exercise by a second court of jurisdiction over a *res* to which the jurisdiction of another court has previously attached would impair or perhaps defeat the jurisdiction of the first court.

speaking through Mr. Justice Cardozo, said (p. 254 of 299 U. S.):

> "• • • The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.*" (Emphasis supplied.)

If it is shown to the court having jurisdiction of the second suit, initiated by the employes under Section 3 First (p) of the Railway Labor Act, that Congress intended the employes to have certain advantages in the latter suit which they did not have in the declaratory judgment suit, it is wholly unlikely that the court in which the employe-initiated suit under Section 3 First (p) was pending would stay proceedings in that suit merely because of the fact that the declaratory judgment suit was filed first. To grant such a stay would, under those circumstances, clearly constitute an abuse of the court's discretion.

But, even though the employes' subsequent suit is not barred by the prior institution of the declaratory judgment action and could not be stayed on account of the prior suit, is it not possible that the prior suit would proceed to judgment before the conclusion of the second suit, so that the employes in the second suit might then be confronted with the judgment in the prior suit as the basis for a plea of *res adjudicata*? To this the answer must be that, if the procedure provided by Section 3 First (p) of the Railway Labor Act and invoked by the employes in the second suit does secure to the employes advantages which they cannot obtain in the first suit and which Congress intended them to have, as the majority below assume, then the court having jurisdiction of the first

suit would necessarily exercise its discretion to stay further proceedings in that suit and thereby permit the second suit to proceed first to judgment.

2. *Assuming That Congress Intended the Advantages of the Procedure Under Section 3 First (p) of the Railway Labor Act to be Preserved to the Employes, the Court Having Jurisdiction of the Declaratory Judgment Suit Would, in the Exercise of Its Discretion, Grant a Stay of That Proceeding Upon the Commencement of a Suit by the Employes Under Section 3 First (p); and to Do Otherwise Would Clearly be an Abuse of Discretion by the Court.*

As pointed out in *Landis* v. *North American Co., supra,* the granting of a stay of proceedings is within the sound discretion of the court having jurisdiction of the proceedings. Moreover, the facts as well as the reasoning in that case would afford ample authority to a court having jurisdiction of a previously instituted declaratory judgment suit for granting a stay of proceedings in that suit, upon application of the employes as plaintiffs in a suit filed under the provisions of Section 3 First (p) of the Railway Labor Act. In the *Landis* case, certain public utilities had filed suits in the District of Columbia against the members of the Securities and Exchange Commission to enjoin enforcement of the Public Utility Holding Company Act of 1935 on the ground of its unconstitutionality. At about the same time, the Securities and Exchange Commission filed a complaint in a Federal District Court in New York to compel certain other public utilities to comply with the Holding Company Act. Shortly thereafter a motion for stay of proceedings was filed on behalf of the members of the Commission in the District of Columbia suits, on the ground that to proceed with the trial of the District of Columbia suits simultaneously with the New York suit, when substantially the same issues were involved in both cases, would impede the orderly and

economical disposition of the controversy. The motion to stay proceedings in the District of Columbia was opposed on the ground that the parties were not the same as in the New York suit, but the motion was nonetheless granted by the District of Columbia Court. This was reversed by the Court of Appeals, but *certiorari* was granted by this Court, which reversed the Court of Appeals. In addition to the passage quoted above (page 40), Mr. Justice Cardozo said (pp. 254-56 of 299 U. S.):

> "Viewing the problem as one of power, and of power only, we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical. * * * True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. *Considerations such as these, however, are counsels of moderation rather than limitations upon power.* * * * *We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.*" (Emphasis supplied.)

Thus, despite the fact that the parties were not the same in both the District of Columbia and the New York suits, although the issues were substantially alike, this Court remanded the proceedings to the District of Colum-

bia Court for the exercise of its discretion in the light of all the circumstances and of this Court's opinion. In the District Court's reconsideration of the motion for stay, "benefit and hardship will be set off, the one against the other, and upon an ascertainment of the balance discretionary judgment will be exercised anew" (p. 259 of 299 U. S.).

To like effect is the opinion of this Court in *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 57 S. Ct. 377 (1937). In that case an insurance company began an equitable action to cancel certain policies on the ground of fraud. Subsequently, the beneficiaries sued on the policies at law in the same court. After motions for dismissal were filed by the defendants in the equity action and were denied by the trial court, the parties in that action stipulated that the equity suit should continue and should be tried before the action at law was tried. In view of the stipulation, there could of course be no question as to the grant of a stay of proceedings. However, in reversing the holding of the Circuit Court of Appeals to the effect that the insurer had an adequate remedy at law and therefore its equitable action was improperly brought, this Court, again speaking through Mr. Justice Cardozo, used language which is particularly apt for the present case (pp. 212-15 of 300 U. S.):

> "No doubt it is the rule, and one recently applied in decisions of this court, that fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available. • • • That being so, an insurer, though the victim of a fraud, may commonly stand aside and await the hour of attack. *But this attitude of aloofness may at times be fraught with peril.* • • • *Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there*

praying cancellation. • • • There is indeed, a possibility that the bringing of actions at law might have been used by the respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. Landis v. *N. American Co., 299 U. S. 248, 57 S. Ct. 163, 81 L. Ed. 153. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another especially where the parties and the issues are the same. Id. If request had been made by the respondents to suspend the suits in equity until the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity."* (Emphasis supplied.)

In the light of these cases, it is clear that if, following the institution by the carrier of a declaratory judgment proceeding of the kind here involved, the employes should begin suit in another court, in venue of their own choosing, under Section 3 First (p) of the Railway Labor Act, and should then apply to the first court for a stay of the declaratory judgment proceeding, it would be entirely within the discretion of that court to grant such a stay, since not only the issues but the parties as well would be the same. And if the employes could show to the court having jurisdiction of the declaratory judgment proceeding that Congress in enacting the Railway Labor Act intended them to have advantages which they could obtain only in their subsequent suit under Section 3 First (p), so that the intent of Congress as manifested in that Act would be better fulfilled by staying the declaratory judgment proceeding while the suit under Section 3 First (p) proceeded to judgment, it is certain that the stay of proceedings would be granted and that it would be an abuse of discretion on the part of the court to refuse such a stay.

In any event, the question would not arise in the present case, because counsel for petitioner in this case has expressly stated, in argument before the District Court (R. 300), that petitioner would raise no objection to permitting a suit by the employes under Section 3 First (p) of the Railway Labor Act, if such a suit were brought, to proceed in preference to the declaratory judgment suit.

The purpose of petitioner in instituting the present declaratory judgment suit is not to deprive the employes of advantages in litigation which they would have and which Congress intended them to have in a proceeding under Section 3 First (p) of the Railway Labor Act. Petitioner is concerned, not that it shall have judicial relief in any particular form, but that it may have an opportunity for judicial determination, in *some* form, of its rights and liabilities under the contract with its employes, and that it shall not be forced to comply with the Board's award without judicial consideration of the question whether that award represents a correct interpretation of petitioner's obligations under the contract. It has chosen this method of proceeding because it appears to be the only course open to it whereby it may have some hope of obtaining the judicial consideration which would otherwise, under the circumstances of the case, be barred to it. As stated by Mr. Justice Cardozo in *American Life Ins. Co.* v. *Stewart, supra,* "an attitude of aloofness may at times be fraught with peril," so that a party against whom a claim is threatened but not actually pressed to judicial decision may "be condemned to loss through the mere inaction of an adversary." That is exactly the situation of petitioner in the case at bar. What it seeks to accomplish by the present action is not the denial to respondents of advantages otherwise available to them, or the frustration of Congressional intent, but merely the protection of its fundamental right to a judicial determination of its obligations and liabilities with respect to a controversy under its contract with its employes.

Clearly, therefore, the majority of the Court of Appeals below erred in assuming that it was necessary to construe the Railway Labor Act so as to exclude a declaratory judgment proceeding like the present one, in order to preserve to the employes such advantages as Congress intended them to have in a suit under Section 3 First (p).

B. Respondents' Contention That Section 3 First (p) Must be Construed as Excluding Other Forms of Judicial Relief Because of Similarity in Language to Sections of the Interstate Commerce Act and the Packers and Stockyards Act Providing for Statutory Reparation Suits Under Those Acts is Unfounded.

The second principal ground on which it is urged that Section 3 First (p) of the Railway Labor Act should be construed as interposing a statutory impediment to the exercise of declaratory judgment jurisdiction in this case consists of the contention advanced by respondents in the courts below (but not relied on to any substantial extent by the majority of the Court of Appeals below*), that Section 3 First (p) must be construed as providing an exclusive remedy because similar language in other statutes—viz., the provisions permitting suits to enforce reparation orders for the payment of money, under the Interstate Commerce Act (49 U. S. C. Section 16(2)) and the Packers and Stockyards Act (7 U. S. C. Section 210 (f))—has been so construed by the courts.

This argument is without merit, for two reasons. In the first place, even assuming, as respondents apparently do, that the so-called reparation-suit provisions of the Interstate Commerce Act establish an absolutely exclusive judicial remedy, it is well settled that identical statutory provisions will not necessarily be given an identical construction unless *in pari materia;* and there is not merely

* See p. 250 of 124 F. (2d); R. 345-46. See also the careful discussion of this point in the dissenting opinion of Judge Stephens (pp. 269-71 of 124 F. (2d); R. 371-73).

an important difference in language between Section 16(2) of the Interstate Commerce Act and Section 3 First (p) of the Railway Labor Act, but the situations and circumstances to which the two provisions are respectively applicable differ in such significant respects that a construction appropriate to the one provision would not necessarily be appropriate to the other. In the second place, the decisions under the reparation-suit provisions of the Interstate Commerce Act do not go so far as to establish any absolute rule of exclusiveness, as respondents seem to suppose, but have simply held that where the statutory suit for reparation is available certain other remedies, as for instance an injunction suit to set aside the order, are not available.

1. *The Rule that Identical Statutory Provisions Should Ordinarily be Given Identical Construction Does Not Apply Because of Important Differences Between the Statutes in Question, viz., the Interstate Commerce Act and the Railway Labor Act, and those Statutes Are Therefore Not in Pari Materia and Not to Be Construed Alike.*

Identity in the language of two separate statutes does not lead to identity of construction where the two statutes are not *in pari materia, i. e.,* where they are not similar in objects and purposes and in the type of circumstances to which they apply. This is firmly settled in the cases.

A classic statement of the rule is that given by the Circuit Court of Appeals for the Eighth Circuit (including Circuit Justices Sanborn and Van Devanter) in *United States* v. *Colorado & N. W. R. Co.,* 157 F. 321 (1907), at page 330, as follows:

> "The rule *in pari materia* • • • the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable • • • because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different."

It would seem to require no argument to show that a statutory provision designed to enable individual shippers to collect money damages for past exactions of unlawful rates is directed against an entirely different evil and seeks to attain an entirely objective from another statutory provision designed to enable employes to compel their employer to assign to them in the future work to which they claim a right under a contract, and to exclude others from the performance of that work. The remedy provided by Section 16(2) of the Interstate Commerce Act is available only in the case of non-compliance by a carrier "with an order for the payment of money." The remedy provided by Section 3 First (p) of the Railway Labor Act covers any order of the Adjustment Board. The order of the Adjustment Board involved in the present case, and indeed most awards and orders of that Board, are in effect directions to the carrier as to its future operating practices, as well as orders to pay money damages. By sustaining a claim, the Board, in substance, says to the carrier that it must henceforth permit certain men to do certain work and not allow other men to do that work, and must also pay money damages for each day in which the claimants are not permitted to do the work. A legal proceeding to give effect by mandamus to a claim of that kind is altogether different in its incidents, consequences and repercussions from a suit merely to recover a sum of money. Accordingly, the grounds on which it might be held that a statutory action to recover a certain sum of money was by implication exclusive of all other forms of judicial remedy would have no necessary applicability to the determination of whether or not the statutory proceeding to enforce a claim to certain work was exclusive. By their difference in terms, the one statute referring only to money claims and the other covering claims to enforce future conduct, the two statutory provisions differ in such an essential particular that rulings with respect to one are not controlling with

respect to the other, under the *in pari materia* rule above stated.

Furthermore, the situations and circumstances to which Section 16(2) of the Interstate Commerce Act and Section 3 First (p) of the Railway Labor Act are respectively applicable differ in such significant and material respects that a construction appropriate to the one provision would not be appropriate to the other.

Attention has already been called above (pages 22-28) to the economic pressure to which a carrier-employer is subjected, under the facts of this case, to comply with the award without a judicial determination of its rights. This pressure is not present in the case of mere claims for money damages based on past transactions which do not affect operating methods and practices for the future. The significance of an award of the Adjustment Board with respect to the future operating practices of the carrier lends an altogether different and more pressing character to the carrier's need for judicial determination of its rights than is the case in connection with a reparation order of the Interstate Commerce Commission. Not merely must the carrier run the risk of choosing between immediate compliance with the award of the Adjustment Board by a change in its method of operation or of having to pay a much larger sum, if the claimant ultimately brings the statutory action and the claim is sustained, but the carrier is furthermore exposed, as already pointed out, to the pressure of the economic bargaining power of the employes. None of this pressure is present in the case of a reparations claim for damages under the Interstate Commerce Act. The presence of such pressure in the one case and its absence in the other establishes such a plain difference between the two statutes—a difference which is reflected in the fact that one statute is expressly limited to money claims while the other is not—that under the *in pari materia* rule it seems clear that a construction of the one statute giving a quality of exclusiveness to the

remedy therein provided is not by necessary or even reasonable implication transferable to the other.

2. *The Decisions Under the Reparation-Suit Provisions of the Interstate Commerce Act Do not Go so Far as to Establish Any Absolute Rule of Exclusiveness, but Simply Hold that Where the Statutory Suit for Reparation is Available Certain Other Remedies are not Available.*

The considerations just advanced impel the conclusion that, even if Section 16(2) of the Interstate Commerce Act and the analogous provisions of the Packers and Stockyards Act had been so construed as to provide that the statutory actions created by those Sections were absolutely and in all respects exclusive of all other forms of judicial remedy, it would not follow by necessary implication that a like quality of exclusiveness must, as respondents contend, attach to the statutory remedy under Section 3 First (p) of the Railway Labor Act. However, the decisions under the reparation-suit provisions of the Interstate Commerce Act do not go so far as to establish any absolute rule of exclusiveness, but have simply held that where the statutory suit for reparation is available certain other statutory remedies are not available.

Thus, for example, it has been held that, where the Interstate Commerce Commission has made a reparation order so as to entitle the successful claimant to bring an action under Section 16(2), the order of the Commission is not of such a character as to conform to the definition of an order under paragraph 28 of Section 41 of the Judicial Code authorizing a suit to enjoin certain orders of the Commission, and accordingly a suit to enjoin a reparation order may not be brought under that section. *Baltimore & O. R. Co.* v. *United States,* 87 F. (2d) 605 (1937). Likewise, in the earlier case of *Brady* v. *Interstate Commerce Commission,* 43 F. (2d) 847 (1930), it was

said that, since a reparation order is not enforceable by the Commission, a suit for a statutory injunction under that section of the Judicial Code will not lie against the Commission to restrain or set aside the order.

These decisions are wholly intelligible without the necessity of presupposing any absolute rule that the judicial remedy provided by Section 16(2) of the Interstate Commerce Act is exclusive of all other forms of judicial relief. Their holding has no direct bearing upon the disposition of the case at bar. The present proceeding is not a suit for an injunction. If it were, it would have been brought against the National Railroad Adjustment Board in Chicago. Petitioner is not contending that the award of that Board can be enjoined. On the contrary, petitioner is here contending merely that the award should not operate as a bar to the exertion of petitioner's present legal rights, including the right to have its contract relations with the respondents adjudicated in a proceeding for a declaratory judgment.

Respondents have asserted below that the statutory procedure under Section 16(2) of the Interstate Commerce Act operates to bar a shipper who has failed to win an award before the Interstate Commerce Commission from subsequently proceeding in court against the carrier, and cited for this proposition *Minds* v. *Pennsylvania Railroad Co.*, 237 F. 267 (1916) (see R. 108), thereby seeking support for the contention that because of Section 3 First (p) of the Railway Labor Act an employe who has failed to win an award from the Adjustment Board is henceforward barred from any form of judicial relief on his contract rights against the employer. The *Minds* case was a suit by a claimant who had been successful before the Commission, and is, therefore, not authority for the proposition for which it is cited. In fact it now seems to be clear that a shipper who has been refused relief by

the Interstate Commerce Commission is not by that fact alone barred from further resort to the courts: see *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 136-40, 59 S. Ct. 754, 760-64 (1939). Petitioner submits that, so far as the cases are concerned, it is an open question whether an employe who has failed to win an award from the National Railroad Adjustment Board may or may not sue the employer on his contract under the general jurisdiction of the courts. Even if it should be held that he may not, this would not preclude the employer from a right to sue, since the position of the employer against whom an award has been entered, without his consent even to have the controversy submitted to the Board, is so essentially different, and his need for judicial relief is correspondingly so much greater (see pages 22-28 above), that the considerations which would apply to him are not the same as those upon which the right of the employe to sue might be denied after such employe has voluntarily chosen the Board as his forum for relief and has failed to win its support for his claim.

It follows from what has been said above, first, that even if it were true, as respondents contend, that the cases establish an absolute rule of exclusiveness with respect to the methods of review provided in Section 16(2) of the Interstate Commerce Act and in the analogous sections of the Packers and Stockyards Act, nevertheless those provisions of the Interstate Commerce and Packers and Stockyards Acts cannot be considered to be *in pari materia* with Section 3 First (p) of the Railway Labor Act, and therefore do not provide an apt statutory analogy to that section, and second, that the cases do not in fact establish any such absolute rule of exclusiveness even with respect to the methods of review provided in those sections of the Interstate Commerce and Packers and Stockyards Acts.

IV. The Decision of the Majority of the Court of Appeals, in so Construing the Railway Labor Act as to Give to the Adjustment Procedure Provided Therein a Compulsory Effect in its Practical Operation, is in Conflict with the Reasoning of This Court in Moore v. Illinois Central R. Co.

Subsequent to the argument of the instant case in the Court of Appeals, but prior to publication of the decision of that Court, this Court decided the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941). Both the majority and the dissenting opinions in the Court of Appeals discuss the *Moore* case, although there had been no argument before the court as to its applicability to the present case. The decision of this Court in the *Moore* case squarely establishes the proposition which petitioner herein advanced in the Court of Appeals, to the effect that the method provided in the Railway Labor Act for the adjustment of disputes arising out of contracts between carriers and their employes is not an exclusive or compulsory method for the adjustment of such disputes. In so holding, this Court said that the adjustment procedure provided in the Railway Labor Act was not "based on a philosophy of legal compulsion," but was essentially a "system for peaceful *adjustment and mediation voluntary in its nature.*" (Emphasis supplied.)*

* In that case suit was brought in behalf of an employe against the railroad for damages for breach of contract, and this Court, in sustaining the district court's judgment for the employe, rejected the argument that the suit was prematurely brought because the employe had failed to exhaust the so-called "administrative" remedies granted him by the Railway Labor Act. The pertinent language of the Court, speaking through Mr. Justice Black, was as follows (pp. 634-36 of 312 U. S.):

> "But we find nothing in that Act [*i. e. the Railway Labor Act*] which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to file a suit in court. * * * For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. *On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.*" (Emphasis supplied.)

It has been shown above (pages 22-28) that the denial by the majority of the Court of Appeals to the carrier of an opportunity for a judicial determination of its basic rights otherwise than by a proceeding brought by the employes under Section 3 First (p) means that a carrier having a dispute with its employes may be compelled, by unilateral submission of the dispute on the part of the employes to the Adjustment Board, to subject itself to a decision of that Board under the adjustment procedure provided in the Railway Labor Act, and may further be compelled, by economic pressure, to comply with an award of the Board against it, without any judicial determination of its rights and liabilities under the contract on which the award is purportedly based. Clearly, a system of adjustment which operates in such a manner can only be described as in fact compulsory, and the decision of the majority below must be considered as so holding. In that respect, it is directly in conflict with the reasoning of this Court in the *Moore* case. If a carrier is denied the opportunity of obtaining judicial relief in a proceeding like the present one, the method of adjustment provided in the Act, so far from being a system "voluntary in its nature," is in fact one which operates in actual practice to *compel* the carrier to abide by the result of the adjustment method. A method of adjustment which operates in that manner is in no sense voluntary, in so far as the carrier is concerned.

The majority of the Court of Appeals apparently recognized the inconsistency between the result which they reached and this Court's decision in the *Moore* case, and attempted to establish a distinction between the two cases. The majority below conceded that, under the *Moore* decision, the method of adjustment provided in the Act was one which the parties were not obliged to choose in the first instance, and that the employes, for example, could ignore the statutory procedure altogether and recover against the carrier in a suit for damages. However, the majority below took the further position that

there was no conflict with the *Moore* decision in holding that, when the parties had once "voluntarily" invoked the method of adjustment provided in the Railway Labor Act, they were thereafter bound to abide by that method, and, when an award of the Board had been issued, were limited to the procedure provided in Section 3 First (p) of the Act, as the only means of obtaining a judicial determination of the rights of the parties under the contract on which the award was purportedly based.

This conclusion is erroneous for two reasons: *first*, it fails to distinguish between a joint submission by the parties under Section 3 First (i) of the Act and a separate submission under the same paragraph by the employes without the joinder or consent of the employer; and *second*, even if this distinction is ignored, the conclusion of the majority below rests upon assuming the very point to be proved, namely, that where there has been a voluntary resort to the adjustment procedure the statutory judicial remedy under Section 3 First (p) must be treated as exclusive—an assumption which is based solely upon the argument shown above (pages 33-46) to be unfounded, that otherwise the employes would be deprived of advantages which Congress intended to secure to them.

A. THERE IS NO ELEMENT OF CHOICE OR VOLUNTARY ELECTION ON THE PART OF A CARRIER IN APPEARING BEFORE THE BOARD TO DEFEND ITSELF AGAINST THE UNILATERAL SUBMISSION OF A DISPUTE BY AN EMPLOYE IN ORDER TO AVOID A DEFAULT AWARD.

1. *The Separate Appearance by a Carrier Before the Board in Opposition to the Unilateral Submission of a Dispute by an Employe is Distinct in Character from a Joint Submission by Both Parties, and is not Voluntary on the Part of the Carrier, Because Such Separate Appearance is Essential from the Carrier's Standpoint in Order to Avoid the Default Award Which the Board Would Otherwise Enter Against It.*

The majority below treat the submission of the dispute to the First Division of the Adjustment Board in the

present case as a joint submission or a submission with the consent or participation of petitioner, and conclude therefrom that such consent on petitioner's part thereafter barred it from obtaining a judicial determination of its rights otherwise than as such determination might be obtained if respondents after the award should bring a suit under Section 3 First (p). The notion of the majority below seems to be that where, as in the present case, the carrier separately appears before the Board to avoid the entry against it of the default award which would otherwise result from the unilateral submission of a dispute by the employes, which submission the carrier had refused to join, such separate appearance constitutes a voluntary choice or election on the part of the carrier of the method of adjustment provided in the Railway Labor Act, including the procedure set up in Section 3 First (p) thereof, as the appropriate method of settling the dispute.* The defectiveness of this reasoning is plain. It results from ignoring the fact that, under the Railway Labor Act (Section 3 First (i)), the adjustment procedure therein provided may be invoked by either party, acting separately, by the submission of the dispute to the Board by such party without the consent or concurrence of the other party or parties to the dispute.†

As a consequence of this provision in the Act, the Board has claimed, and has in fact exercised (as appears from its published reports) the power to enter an award, in

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*See discussion in majority opinion below (R. 338, 345; pp. 243-4, 249 of 124 F. (2d)). The comments on this point in a footnote to the opinion (R. 332, note 5; p. 239 of 124 F. (2d)) suggest a confusion in the minds of the majority between questions as to a court's power over the *person* of a party, which is conceded by a general appearance by that party, and questions as to its power in other respects to adjudicate the issues before it, which is not conceded by such an appearance. Jurisdiction of the person may be conceded by a general appearance, but jurisdiction of the subject-matter is not, and it is the latter type of jurisdiction which is here in question.

†The language in Section 3 First (i) is that disputes of the kind contemplated by the Act "may be referred by petition of the parties *or by either party*" to * * * the Adjustment Board. (Emphasis supplied.)

the case of a dispute so submitted, regardless of whether or not the carrier appears before it. The reports of the Board indicate that, if employes submit a dispute and the carrier refrains from appearing before the Board in opposition to the employes' claim, the Board simply enters an award in favor of the employes, as a matter of course, irrespective of the merits.* Under such circumstances, the separate appearance of the carrier in opposition to a unilateral submission of the dispute by the employes is not in any sense a voluntary election on the part of the carrier to resort to the statutory method of adjustment—as might be true in the case of a joint or concurrent submission by both parties—because the Board would proceed without such appearance by the carrier and would enter an award against it for mere default of appearance. When an employe unilaterally submits a dispute to the Board without the consent of the carrier, the only sensible course open to the carrier is thus to appear separately before the Board and attempt to defend itself. In view of the fact that the Board is, under the provisions of the Railway Labor Act, empowered to hear and decide a dispute on the submission of one party alone, refusal on the part of the carrier to appear and defend itself on the merits before the Board would be as unwise and as neglectful of the carrier's rights as it would be for a defendant in a Federal court proceeding to refuse to present its case on the merits to the court after a denial of its motion to dismiss for want of diversity of citizenship or other like jurisdictional basis.

There is at the same time a broader standpoint from which this matter must be viewed—the standpoint of public policy and of the rational effectuation of Congressional intent. The majority below apparently take the position that a carrier, against whom a claim has been filed before the Adjustment Board, can only protect its

*Vol. 12, "Awards 2066 to 2200, First Division, National Railroad Adjustment Board," pp. 318-370, inclusive (Government Printing Office).

position by ignoring, and in order to protect its position must ignore, the Adjustment Board—that it can only obtain a legal adjudication of its rights by a judicial body if it absolutely and completely refuses to have anything to do with the statutory agency set up by Congress. Surely, this is an unrealistic and unduly technical approach to a problem of great magnitude. It says, in substance, that the carriers are entitled to a judicial determination of their rights only if they refrain from dealing with the adjustment procedure established by the Railway Labor Act. As a practical matter, how can the carriers refrain from dealing with that machinery? Does anyone suppose that, in practice, the carriers could properly and successfully adopt a policy of ignoring the Adjustment Board and its awards, in cases which are submitted to the Board by the employes whether or not the carriers concur or join in the submission? The existence of the adjustment procedure, its establishment by Congress, its embodiment as an important provision in the Railway Labor Act, and the expectation founded upon it by the carriers' employes, all preclude the possibility of the course which the majority of the Court of Appeals say that the carriers must follow if they are to protect and observe their right to a judicial interpretation of their contracts.

It follows from these considerations that the status of an award of the Adjustment Board with respect to the rights of a carrier should not and cannot be regarded as in any respect altered or enhanced by the fact that the carrier may have appeared, as in the present case, to avoid a default award against it. Accordingly, petitioner's separate appearance before the Board, in order to avoid having the Board make a default award against it, cannot be treated as equivalent to a joint submission of the dispute to the Board, because it was not in any proper sense voluntary. A joint submission might perhaps have constituted, on the part of petitioner, a voluntary choice or election of the adjust-

ment method, of the kind the majority below had in mind. But there was no such joint submission. Therefore, there was no voluntary acceptance by petitioner of the adjustment method. The petitioner appeared merely to avoid a default award, and therefore its appearance cannot be held to constitute a waiver of any right to a judicial determination which petitioner would have in the absence of a joint submission to the Board.

2. *The Doctrine of Election of Remedies, on Which the Attempt of the Majority Below to Distinguish the Moore Case Appears to Rest, Has no Application to the Present Case.*

In attempting to distinguish the present case from the *Moore* case on the assumption that the petitioner's separate appearance before the Board constituted a voluntary choice or election of the statutory method of adjustment, the majority below seem to have in mind the notion that petitioner's separate appearance before the Board constituted an "election of remedies" so as to bring into operation the doctrine according to which the election of one remedy may under some circumstances bar a subsequent shift to another inconsistent remedy. But this doctrine is not applicable to the present case, for two reasons.

In the first place the doctrine of election of remedies presupposes a voluntary choice or election of the remedy first resorted to. Thus, this Court has said in *Wm. W. Bierce, L'd,* v. *Hutchins,* 205 U. S. 340, 27 S. Ct. 524 (1907) (p. 346 of 205 U. S.):

> "Election is simply what its name imports. A *choice* shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone." (Emphasis supplied.)*

*See also *Pittsburgh Terminal Coal Corporation* v. *Bennett,* 73 F. (2d) 387 (C. C. A. 3rd, 1934), where the court said (p. 389):

> "Election involves a *choice,* and choice presupposes a knowledge of alternatives and *freedom and opportunity to choose between them.*" (Emphasis supplied.)

But in the present case, as has already been shown, there was no element of choice or voluntary action on the part of petitioner in its separate appearance before the Board in opposition to the employes' unilateral submission, to avoid having a default award entered against it.

In the second place, the doctrine of election of remedies applies only where the remedies are inconsistent. The governing principle with respect to election of remedies has been stated in *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 43 S. Ct. 100 (1922) as follows (p. 295 of 260 U. S.):

> "Any decisive action by a party, with knowledge of his rights and of the facts, determines his *election* in the case of *inconsistent remedies*, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these *inconsistent conclusions.*" (Emphasis supplied.)

Thus, the doctrine that the election of one remedy operates to bar subsequent resort to another remedy requires an inconsistency between the two remedies.. It does not apply where the remedies are not inconsistent and where the change from one remedy to the other does not infringe upon rights which arose as a result of the choice of the prior remedy.*

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* This is pointed out in *McFadden Securities Co.* v. *Stoneleigh Garage*, 55 F. (2d) 1025 (App. D. C., 1932). There a suit upon a lien on cars which the plaintiff had sold to the defendant was held by the District Court to be barred because the plaintiff had previously intervened in an equity receivership proceeding to secure payment for the cars out of funds in the hands of the receiver. The ground of the holding was that the intervention in the receivership proceeding constituted an election of remedies which barred the plaintiff from proceeding directly against the goods sold. The Court of Appeals reversed the District Court's action, saying:

> *"The doctrine of election, where it applies at all, applies only to a case where one assumes an inconsistent position,* or where, through his action, other rights have arisen as to which he should be estopped to take a contrary position. It is never applicable where, as here, a creditor has a right to pursue more than one remedy." (Emphasis supplied.)

To the same effect is *United States* v. *Ickes*, 73 F. 2nd 844 (App. D. C., 1934).

The inconsistency which must exist as a condition precedent to the application of the doctrine of the election of remedies does not consist merely of differences in methods of procedure or forms of actions, but is that which arises from the irreconcilability of legal theories upon which the respective remedies are founded. In the present case there is no such inconsistency between the remedies, *i. e.*, between the theories of the two methods of determination of the controversy here involved. Whether the determination is by application to the Board of Adjustment and suit to enforce the Board's award under Section 3 First (p) of the Railway Labor Act, on the one hand, or by a declaratory judgment proceeding, on the other hand—or for that matter, by a suit in court for damages by the employes, as in the *Moore* case—the rights and liabilities involved are determined by the same contract between the carrier and its employes, and the outcome depends upon the interpretation of that contract, which interpretation must be the same, regardless of the particular form of action in which the interpretation is sought.

Accordingly, the doctrine of election of remedies does not operate, under the facts of the present case, to bar the maintenance by petitioner of the present declaratory judgment proceeding.*

* The fact is that the doctrine of election of remedies is one which today has very limited and infrequent application. Modern courts appear to be viewing the doctrine with an increasing amount of suspicion and to be restricting its application to cases clearly calling for it. Thus, in *Friederichsen* v. *Renard*, 247 U. S. 207, 38 S. Ct. 450 (1918), this Court held that the institution of an equity suit seeking cancellation of a contract and deed for the exchange of lands would not bar a subsequent action at law for damages on the contract because the issues were substantially the same in both cases, although different in form and although the one suit in effect denied the contract while the other affirmed it; and in so holding this Court pointed out that the doctrine of election of remedies "has never been a favorite of equity," and went on to say:

> "At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended, as it must be in order to reach the case at bar" (pp. 211, 213, of 247 U. S.).

To the same effect is *Oil Well Supply Co.* v. *First Nat. Bank of Winfield, Kan.*, 106 F. (2d) 399 (C. A. A. 10th, 1939).

From what has been said above it follows that the majority below have failed successfully to distinguish the present case from the decision of this Court in the *Moore* case. Their attempt to establish such a distinction rests solely upon the erroneous assumption that there was a voluntary choice or election of the statutory method of adjustment on the part of petitioner in appearing before the Board. But there was *no* such voluntary choice or election in the petitioner's separate appearance in opposition to respondents' unilateral submission of the dispute, and the fact therefore remains that, under the decision of the majority below, the operation of the method of adjustment provided in the Act is compulsory, so far as the carrier is concerned, contrary to the construction placed upon the Act by this Court in the *Moore* case.

3. *The Suggestion Tentatively Advanced by the Majority Below, that Section 3 First (p) Might be Construed as Merely Suspending for the Two-year Limitation Period the Carrier's Right to Invoke Relief in Another Form of Proceeding, is Unsound and Demonstrates the Weakness of the Majority's Position.*

The majority below were apparently conscious of the difficulty involved in holding petitioner barred from its right to a judicial remedy, as well as of the difficulty of reconciling their position with the decision of this Court in the *Moore* case. This consciousness of uncertainty seems to emerge in the suggestion made in the majority opinion that perhaps Section 3 First (p) of the Railway Labor Act should be construed not to bar altogether resort to the courts in a proceeding other than that provided therein, after submission to the Board and an award therefrom, but only to *suspend* the right of a carrier to invoke judicial relief in another form of pro-

ceeding during the two-year period following the issuance of the award, in which a suit under Section 3 First (p) can be instituted.*

The suggestion is offered by the majority below apparently as a possible escape from the implied conflict between its decision and the decision of this Court in the *Moore* case, and not as a positive holding of the court. But this suggestion serves merely to increase rather than to diminish the difficulties of the majority below. If Section 3 First (p) of the Railway Labor Act operates to suspend for two years the employer's right to a judicial determination of its dispute with the employes in any other form of proceeding than that provided by that Section, then, for the reasons already indicated (pages 22-28 above), the procedure provided by the Railway Labor Act for adjustment of disputes becomes compulsory upon the carrier *for that period,* in that it does not permit the carrier to obtain a judicial determination of its rights during that period and accordingly allows the economic pressure of the circumstances and of the employes' bargaining power to operate during that period to compel the carrier to comply with the award. To that extent, therefore, Section 3 First (p), as thus construed by the majority below, is an embodiment of a "philosophy of legal compulsion," which, according to the *Moore* decision, was not within the intent of Congress.

Moreover, the suggestion that the carrier's right to a judicial determination of the issues in dispute otherwise than in a suit under Section 3 First (p) is merely sus-

* This appears in the language which the majority below used in connection with the *Moore* case (*e. g.*, R. 338, 345; pp. 243-4, 249 of 124 F. (2d)), especially the following:

"The important thing is that the statute gave the initiative in litigation to review the award to the employee for two years. *For disposing of this case, it is immaterial whether this amounted to a mere suspension, for that period, of the employer's right to sue* or was intended, with other provisions of the Act to bar it altogether" (R. 347; p. 251 of 124 F. (2d)). (Emphasis supplied.)

pended for two years does not provide any basis for dismissal of the present suit at this stage of the proceedings, since the two-year period has now expired, and had in fact expired when the decision of the Court of Appeals below was handed down.* If this suggestion of the majority below were sound—and petitioner believes it is thoroughly unsound and serves merely to demonstrate the confusion in which the majority below find themselves—then, after the two-year period of suspension is over, there would be no reason why the proceeding should not go forward, so as to permit a judicial declaration of the rights of the parties. The reasoning of the majority below in this respect is thus in conflict with their conclusion. If the suggestion made in the majority's reasoning, that the carrier's right to a judicial determination otherwise than in a suit under Section 3 First (p) is merely suspended for two years following submission to the Board and an award therefrom, were really accepted by the majority below as sound, there would be no basis for reaching the conclusion which the majority in fact did reach, to the effect that this suit should be dismissed, even though the two-year period has expired. If, on the other hand, the suggestion is not a sound one—as petitioner believes—then the decision of the majority below must be construed as holding that resort by the carrier to a judicial determination of its rights is completely barred by the employes' unilateral submission of the dispute to the Board and the issuance by the latter of an award upholding the employes' claim. And in that event, for the reasons already shown, the decision of the majority below must be regarded as in conflict with the reasoning of this Court in *Moore* v. *Illinois Central, supra.*

* This case was submitted to the Court of Appeals below on April 18, 1940, and the opinion of that court was not handed down until November 18, 1941 (R. 330-331). The award of the Board was rendered October 24, 1938 (R. 4, 54).

B. Even if it be Assumed that Petitioner's Appearance before the Board Constituted a Voluntary Choice of the Adjustment Method, the Attempt of the Majority Below to Distinguish the Moore Case is Unsound Because it Erroneously Assumes the Point to be Proved, viz., that the Statutory Judicial Remedy Provided by Section 3 First (p) of the Railway Labor Act is Exclusive of all other Judicial Remedies.

Even conceding, however, and solely for the purpose of argument, that the majority below is correct in holding that there was an element of voluntary choice on the part of petitioner in appearing before the Adjustment Board, it does not follow that petitioner is thereby barred from any judicial proceeding for the determination of its contract rights otherwise than in a suit brought by the employes under Section 3 First (p). That conclusion would follow only by making a further assumption, which would be an assumption of the very point to be proved. It would follow only if it is taken for granted that the suit under Section 3 First (p) must be treated as an exclusive judicial remedy with respect to claims which have been submitted to the Adjustment Board. In the absence of any express Congressional intent to make that procedure exclusive, the conclusion that it must be regarded as so is founded by the majority of the Court of Appeals solely on the argument which has already been shown above (pages 33-46) to be erroneous, viz., that otherwise the employes would be deprived of advantages which Congress intended to secure to them. Without the support of that argument, there is no foundation for the conclusion that, even if petitioner did participate in the proceeding before the Adjustment Board, it has thereby lost its right to any judicial remedy that might otherwise be open to it.

In short, the sole ultimate ground upon which the decision of the majority below rests is comprised in the argument that this suit cannot be maintained because it would deprive respondents of the advantages that they

would otherwise obtain from Section 3 First (p) of the Act, and that argument has been shown above to be completely erroneous. In the last analysis, that is the single issue upon which all the other issues now presented to this Court depend.

V. Construction of the Railway Labor Act in the Manner Adopted by the Majority of the Court of Appeals, so as to Preclude Petitioner from Obtaining a Judicial Determination of its Rights in a Declaratory Judgment Proceeding, is to be Rejected because it would Render the Act of Doubtful Constitutionality.

Construction of the Railway Labor Act in the manner adopted by the majority below, whereunder its operation will, as shown above, unfairly and unreasonably suppress judicial consideration and determination of the rights and liabilities of the parties with respect to any dispute which the employes may choose to submit to the Board, is to be rejected for the reason that the Act if so construed would be of doubtful constitutionality. So construed, it would mean that, despite the safeguards of Article 3, Section 1, of the Constitution of the United States, vesting judicial power in the Courts, and of the due process clause of the Fifth Amendment thereto, one of two parties to a contract, viz., the carrier-employer party to a collectively bargained agreement with its employes, would, in the event of a dispute with respect to the interpretation of the contract, be bound by the decision of a non-judicial body of private persons, and would find the doors of the courts closed against it in actual effect, and held closed for a period of time sufficient to enable the other party to the contract to compel by extra-judicial means acquiescence in the construction of the contract favored by such other party. Petitioner submits that such a construction of the Act would not only vest in such non-judicial body the final authority of judicial power which Article 3, Section 1, of the Constitution has preserved to

the courts, but would also deprive petitioner and other like-situated carrier-employers of the due process of law guaranteed by the Fifth Amendment to the Constitution. Such a construction would, in fact, wholly destroy the character of petitioner's collective agreements as contracts, and would turn them into no contracts at all: *Von Hoffman* v. *City of Quincy*, 4 Wall. 535 (1866).* In place of such a result, the court should prefer a construction of the Act which would be consistent with all indications of Congressional intent as to the voluntary nature of the adjustment procedure, and at the same time would preserve to the statute a reasonable and fair operation and eliminate doubts as to its constitutionality.

The difficulties with which the petitioner is confronted, and the denial to it of an opportunity for judicial determination of its rights and liabilities, resulting from the operation given to the Railway Labor Act by the decision of the majority below, present a situation which is closely akin to that in which the petitioners in *Ex Parte Young*, 209 U. S. 123 (1908), and the cases following it, found themselves, and with respect to which this Court granted relief to the petitioners in those cases, in order to avoid violation of their constitutional right to a judicial determination. Those cases firmly establish the proposition that, when a legislature provides a statutory remedy but at the same time interposes such conditions precedent to the availability of the remedy that the hazards or burdens incident to its use in fact operate to deter resort to it, the courts will provide judicial relief in an appropriate proceeding, even though the statutory remedy is plainly intended to be exclusive. Thus, in *Ex Parte Young, supra*, this Court, speaking through Mr. Justice Peckham, said, at pages 163 and 165:

* "Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable." (Page 552 of 4 Wall.).

"It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

• • • • • • •

"To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take." (Emphasis supplied.)

As was stated by Mr. Justice Lamar in *Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651 (1915), speaking of the constitutionality of legislation fixing rates (pages 660-661):

"And this right to a judicial determination exists whether the deprivation is by a rate statute—passed

without a hearing (as in the *Young* and *Consolidated Gas Cases*); or by administrative orders of a Commission made after a hearing • • • any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been there[by] deprived of a right protected by the Constitution • • •. *But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law.*" (Emphasis supplied.)

Similarly, in *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920), a statute authorizing an administrative commission to fix rates for public utility service provided, as the only and admittedly exclusive method of judicial review, that a non-complying utility might be penalized by the commission for its disobedience and such penalty order would be subject to judicial review in which the utility might challenge the legality of the rate order. A utility against which a rate order had been made, instead of waiting for the commission to institute penalty proceedings against it, appealed directly to the courts for injunctive relief, and this Court, in holding that such relief should be granted, said, through Mr. Justice Brandeis (pp. 336-37 of 252 U. S.):

"It appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt • • •. By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to

show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is open to him by way of appeal on the whole record to the Supreme Court. *But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident* * * *. The penalty may apparently be imposed for each instance of violation of the order * * *. *Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements.*" (Emphasis supplied.)*

It should be noted that the exclusive statutory procedure here held inadequate resembles the allegedly exclusive remedy available to petitioner under Section 3 First (p) of the Railway Labor Act in that in both instances the power to institute the judicial proceedings is placed solely in the hands of the other party to the controversy—viz., the commission in the case cited, and the employes in the case at bar. In both instances the complainants are powerless under the statute to take action themselves to set in motion the judicial machinery supposed to be available for their relief. Their hands are tied; and in the interval they are subjected to hazards so great and cumulative that, from the judicial notice which will be taken of what can be expected of reasonable men, it is apparent that such men will prefer not to wait but will yield. Under such conditions the judicial remedy, which is apparently held out by the language of the law, is in substance and reality denied by the facts. It is an illusory and simulated remedy.

Thus, in *Ex Parte Young, supra,* and in the *Wadley Southern* and *Oklahoma Operating Co.* cases, and other

* See also the opinion of Mr. Justice Holmes in *Missouri Pacific Ry.* v. *Nebraska,* 217 U. S. 196, 30 S. Ct. 461 (1910), at pages 207-208 of 217 U. S.

cases following them, it was held that provisions of a statute which in their practical operation, as by the imposition of unduly heavy penalties, deter resort to judicial review for the final determination of basic rights and liabilities are violative of constitutional rights, and persons whose constitutional rights are thus infringed are to be given relief against the operation of such provisions so as to permit a proper judicial determination to be had. So likewise, in the present case, the operation given to the Railway Labor Act by the decision of the majority of the Court of Appeals is such that, as shown above (pages 17-28), petitioner and other carriers against whom awards of the Adjustment Board have been entered are effectively compelled to comply with a non-judicial award while being prevented from obtaining a judicial determination of the rights and liabilities on which such award is purportedly based. Certainly, a construction of the Railway Labor Act which thus tends to deprive petitioner of its constitutional right to judicial consideration of such rights and liabilities is to be rejected in favor of a construction which preserves and protects that constitutional right, as does the construction urged by petitioner.

VI. If for the Purpose of Argument the Adjustment Board is Conceded to be a Quasi-Judicial or Administrative Tribunal—which Petitioner Insists it is Not—Nevertheless the Policy Established by this Court in its Recent Decisions, Especially in Rochester Telephone Corporation v. United States, Disposes of the Contention That the Issues Determined by the Board Should Not Be Subject to Judicial Review, and Makes it Clear that the Declaratory Judgment Procedure is Appropriate for Securing Such Review.

Petitioner has maintained throughout this case, and it still maintains, that the Adjustment Board is constituted

and operates as a wholly non-judicial body, and that its actions and powers do not partake of the character of a public quasi-judicial or administrative tribunal, such as the Interstate Commerce Commission, for example (see pages 17-22 above). For this reason petitioner contends that the present suit is in no sense an effort to obtain a judicial review of the action of such a public quasi-judicial or administrative tribunal, but is merely an attempt to obtain a judicial determination of the basic rights and liabilities involved in an actual controversy between the parties.

But even if it should be conceded—and petitioner does not so concede—that the Adjustment Board is a public quasi-judicial or administrative tribunal, nevertheless it is submitted that petitioner would still be entitled to a judicial review of the action of the Board in this case, under the principles of recent decisions of this Court, especially the decision in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 59 S. Ct. 754 (1939). In that case it was made clear that the policy of this Court is to permit judicial review of orders of administrative tribunals, even where those orders are not of such a character as to command affirmative action.

The suit in that case was brought in equity by the Telephone Company to obtain a review of an order of the Federal Communications Commission, which order held that the Telephone Company was subject to the jurisdiction of that Commission. The order of the Commission did not require the Telephone Company to change its practices or take any other affirmative action, but merely held it subject to the Commission's jurisdiction, although in so doing the order carried with it the requirement of compliance with certain other previously formulated mandatory orders addressed generally to carriers subject to the Commission's authority. The contention was made that the order was not a reviewable one because it was "negative" in character and came within the doctrine

of *Procter & Gamble* v. *United States,* 225 U. S. 282, 32 S. Ct. 761 (1912), and cases following it, which held that so-called "negative" orders of administrative tribunals were not subject to judicial review. This Court, speaking through Mr. Justice Frankfurter, made a full and careful examination of those cases and of the general subject of review of orders of administrative tribunals, and came to the conclusion that the doctrine of non-reviewability of "negative" orders was unsound, and, further, that where certain necessary conditions precedent were established, orders of administrative tribunals were generally reviewable, subject to two doctrines of limitation. The conditions precedent which are required for judicial review of adverse action by an administrativve tribunal were stated to be (page 132 of 307 U. S.): "(*a*) 'case' or 'controversy' under Article 3; (*b*) the conventional requisites of equity jurisdiction; (*c*) the specific terms of the statute granting to the district courts jurisdiction in suits challenging 'any order' of the Commission." The two doctrines which were referred to as limiting such judicial review, when the necessary conditions precedent had been established, were, (*a*) the "primary jurisdiction doctrine," requiring that matters calling for technical knowledge must first be submitted to the Commission, and (*b*) the doctrine of "administrative finality," whereby the scope of judicial review is limited to questions affecting constitutional power, statutory authority, and the basic prerequisites of proof (see pages 139-40 of 307 U. S.).

Thus, the decision of this Court in the *Rochester Telephone* case must be taken to have made it clear that a party adversely affected by the action of an administrative tribunal may, upon a showing of the existence of the necessary conditions precedent, and subject to the limiting doctrines above referred to, assert a right to judicial review of such action, and that it is the policy of the courts to protect the right to such judicial review. Even where no statutory method of review is provided for the

type of administrative action involved, the courts will grant judicial review in some appropriate form, as by the exercise of declaratory judgment jurisdiction: *Perkins* v. *Elg, supra.* Applied to the facts in the present case, the *Rochester Telephone* decision, and the policy which it plainly represents, require that, if the Adjustment Board be conceded to be a quasi-judicial or administrative tribunal, its action in this case, consisting of an award against petitioner, should be subject to judicial review in the present proceeding.

It is clear that the three necessary conditions precedent for such review, referred to in the *Rochester Telephone* case, are present in the case at bar. It has already been shown (pages 28-29 above) that an actual controversy is involved, and the first condition precedent—that a "case" or "controversy" be shown to exist—is therefore established. With regard to the second condition precedent—*i. e.*, "the conventional requisites of equity jurisdiction"—since the present suit is not technically in equity but is under the Federal Declaratory Judgments Act, the requisites which must be shown are those required to establish jurisdiction under that Act; and it has already been demonstrated (see pages 28-32 above) that the necessary requisites for the exercise of declaratory judgment jurisdiction exist in the present case. With regard to the third condition precedent—*i. e.*, compliance with the specific terms of the statute granting to the Court jurisdiction of the suit—the same answer applies, since the statute under which jurisdiction is invoked in this case is the Declaratory Judgments Act, and the necessary jurisdictional requirements thereunder have already been shown to be present (see pages 28-32 above). That the exercise of declaratory judgment jurisdiction to review the action of an administrative agency or tribunal may be proper is shown by the recent decision of this Court in *Perkins* v. *Elg, supra* (see page 32 above).

So far as the limiting doctrines of "primary jurisdiction" and "administrative finality" are concerned, no

obstacle to the present suit is interposed by them. The doctrine of "primary jurisdiction" is not applicable because resort has already been had to the administrative tribunal in question and no further relief from that tribunal is possible; and the doctrine of "administrative finality" does not bar petitioner's present claim, because the question now before the Court is not what the scope of the review shall be but whether or not there shall be any review at all.

Respondents have argued below, and will undoubtedly argue to this Court, that there is no need for a judicial review of the Board's award, because that award, standing alone, has no legal significance or effect and petitioner is in no way adversely affected by it until a suit to enforce it is brought under Section 3 First (p). What respondents appear to have in mind in making this argument is that, since the Board's award is not in the form of an administrative order requiring affirmative action by petitioner, the existence of the award, without an enforcement suit under Section 3 First (p), presents nothing which may properly be the subject of judicial review.

But this argument is completely answered by the decision in the *Rochester Telephone* case. There it was expressly held that the fact that the action of the administrative tribunal does not command affirmative conduct is no bar to a judicial review at the instance of a party adversely affected by the legal consequences of the administrative action. As Mr. Justice Frankfurter said (p. 132 of 307 U. S.):

> "Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences, as was the case in *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412, or where the Commission's order denies an exemption from the terms of the statute, as in the *Inter-Mountain Rate Cases,* 234 U. S. 476, *the road to the courts' jurisdiction seems to be*

> *clear.* There is a constitutional 'case' or 'controversy,' *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties;* and the suit is within the express language of the Urgent Deficiencies Act in that it is one 'to enjoin, set aside, or annul' an 'order of said Commission.' 28 U. S. C. Secs. 46, 47." (Emphasis supplied.)

In the present case, it is clear that the award of the Board does have legal consequences which adversely affect petitioner. In the first place, the mere existence of the award operates, as shown above (pages 22-28), to impose increasing pressure upon petitioner to comply with respondents' demands; or, in the language of Mr. Justice Frankfurter, "disregard of the [Board's] adverse action entails threat of oppressive penalties." The fact that the penalties would result, not from a statutory provision penalizing disobedience, but from the cumulative nature of the award itself, can make no difference, since the penalties are nonetheless real and oppressive and are threatened as a result of the Board's action. In the second place, the award of the Board has very definite legal consequences if its existence is sufficient to bar petitioner from a judicial determination of its rights and liabilities under the contract with its employes. If no award of the Board were outstanding, petitioner's right to a declaratory judgment would be clear, since an actual controversy with respect to the contract between petitioner and its employes would be presented by respondents' claims, which were first advanced before the dispute was submitted to the Board (R. 8). But if the majority below are correct, the existence of the Board's award creates a bar to the right which petitioner would otherwise have of obtaining a judicial determination of its obligations under the contract, and, therefore, the Board's

action in rendering the award has very serious legal consequences adverse to petitioner's interests.*

It follows that respondents' argument to the effect that the award of the Board standing alone requires no action on the part of petitioner and has no legal significance or adverse effect on petitioner's interests must be rejected as unsound, in view of the *Rochester Telephone* decision.

Plainly, the policy established in the *Rochester Telephone* case requires that the decision of the majority of the Court of Appeals below in this case should be reversed and the suit permitted to proceed so that judicial consideration of the issues involved in the award of the Adjustment Board against petitioner may be had. The

* The fact that awards of the Adjustment Board are not without legal effect or significance is shown by the decision in *Delaware & Hudson R. Corporation* v. *Williams*, 129 F. (2d) 11 (C. C. A. 7th, 1942). In that case a number of employe-carrier disputes had been submitted to a Division of the National Railroad Adjustment Board. In accordance with the usual practice, a referee was called in to break the deadlock between the carrier members and the employe members of the Division. While the disputes were still being considered by the referee, the employes apparently learned in some way that the referee had made up his mind to decide the disputes against them. Upon receiving this information the employes' organization promptly notified the Division by phone and by wire that the disputes were withdrawn from the Division's consideration. Subsequently, some of the same disputes were resubmitted to the Division by the same disputants, and it appeared from the allegations in the case that all the disputes would soon be resubmitted. The carrier brought suit to compel the members of the Division to proceed to a conclusion of the Division's consideration of the disputes as first submitted. The District Court held that it was without jurisdiction of the suit, but the Court of Appeals reversed the District Court, being plainly impressed with the injustice of permitting a disputant before the Board to withdraw, upon learning of an impending unfavorable decision, for the purpose of resubmitting the dispute in the hope of receiving more favorable treatment from another referee. In so doing the Court of Appeals held that the District Court had jurisdiction to grant mandatory relief to compel the Division, not to reach a particular conclusion, but to proceed with its consideration and to reach some conclusion with respect to the disputes before it. This holding is clearly inconsistent with the supposition that the proceedings before the Board, culminating in an award in favor of one or the other of the disputants, are without legal significance, since there would be no point in requiring the Board to proceed to a conclusion and to the rendering of an award if such award was to have no legal significance or consequences.

wisdom of the policy of thus protecting the right to judicial consideration is demonstrated with particular clarity by the facts of the present case. To construe the Railway Labor Act, as the majority below have done, so as to bar petitioner from the right to bring the present proceeding, is in practical effect, as shown above, to preclude a carrier from any judicial determination of its rights under the contract with its employes, in a case where the employes have seen fit to submit a dispute to the Adjustment Board and thereby compel the carrier, without its consent, to be subjected to an award of the Board against it and to economic pressure toward compliance with the award. Clearly, such a result is unjust and unreasonable. If the collectively bargained agreements to which the Act is intended to apply are really contracts, then there must be some practicable and available means for the parties, or either of them, to obtain a judicial determination as to the proper interpretation of the contract and their respective rights and obligations under it. *Otherwise, the effect of the Act would be—and, under the decision of the majority below, its effect is—to place these collectively bargained agreements in the same category as international treaties, which under present-day conditions have only such meaning and effect as the party with superior force chooses to allow them to have.* Petitioner believes that the Railway Labor Act should not be construed so as to reproduce international anarchy in the field of labor relations in the railroad industry, unless there is a clear and positive indication in the legislative history of the Act or on the face of the Act itself that Congress intended it to be so construed. But, as shown elsewhere in this brief (pages 33, 84-85), there is no such indication either in the legislative history of the Act or on the face of the Act itself.

It is therefore submitted that, since the necessary conditions precedent for judicial review of adverse administrative action are present, and no obstacle is interposed

by the doctrines of limitation upon such review, the policy of protecting the right to such review, manifested in Mr. Justice Frankfurter's opinion in the *Rochester Telephone* case, and applied in the holding of this Court in *Perkins* v. *Elg, supra,* is particularly appropriate for application in the present case, in the light of its peculiar facts. It follows that, even if it be assumed, contrary to petitioner's primary contentions, that the Adjustment Board is a public administrative tribunal entitled to stand in the same class with the Interstate Commerce Commission, for example, nevertheless the present suit should be allowed to proceed on the merits, so that petitioner may obtain a judicial review, otherwise denied to it, of administrative action adverse to its interests.

VII. To Allow the Judicial Relief Sought in This Proceeding Would not Render the Provisions of the Railway Labor Act as Intended by Congress Unworkable, and is not Forbidden by the "Policy" of that Act.

Throughout their arguments in the courts below, respondents repeatedly suggested, sometimes expressly and sometimes by implication, that to allow the judicial relief sought in this proceeding would in some way render the provisions of the Railway Labor Act, as intended by Congress, unworkable, and would be contrary to the "policy" of that Act. This suggestion was supported not by reference to the provisions of the Act but by considerations *dehors* the language of the statute, which it was intimated should govern the construction of those provisions. Thus, the fact that Congress, by the Railway Labor Act, has established a permissive procedure for the informal adjustment of disputes between carriers and their employes was seized upon as a basis for attributing to Congress an intention to make judicial procedure unavailable, and for attributing to Congress "the probable intent of making resort to the courts unattractive to the

carriers." (Defendants' Memorandum Brief, pp. 37-38, R. 103-104.)

In support of the contention that Congress was actuated by an intent to make judicial procedure unavailable, respondents have quoted the following language from the report of the Committee of the House of Representatives on Interstate and Foreign Commerce, recommending the passage of the Railway Labor Act:

> "The major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as grievances, which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions. * * * This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties." (Defendants' Memorandum Brief, p. 68, R. 134.)

Certainly all that this language can be made to mean is that the settlement of controversies by compromise or "adjustment" is desirable. It says nothing, and implies nothing, in disparagement of the right to a judicial determination of legal issues which cannot be settled by compromise or adjustment. On this latter point there is clear and explicit language in a passage from an opinion by this Court, in *Penna. R. R.* v. *Labor Board*, 261 U. S. 72, 43 S. Ct. 278 (1923), at page 84 of 261 U. S., quoted by respondents in their brief above referred to. (Defendants' Memorandum Brief, p. 69, R. 135.) In that case, this Court said, speaking of the functions of an earlier board from which the present National Railroad Adjustment Board has evolved:

> *"But title 3 was not enacted to provide a tribunal to determine what were the legal rights and obliga-*

tions of railway employers and employees, or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in running the railroad. It was to reach a fair compromise between the parties, without regard to the legal rights upon which each side might insist in a court of law." (Emphasis supplied.)

Here is the clearest possible statement of what respondents have ignored. In the language just quoted, this Court recognizes and emphasizes that there is a useful and important function to be performed in promoting and facilitating compromise and cooperation between employes and employers, and that this is a different function from the protection of legal rights. The recognition of this fact does not, however, carry with it the conclusion, as respondents seem to assume, that legal rights should, therefore, be deprived of protection. As the passage quoted above from the opinion points out, the protection of legal rights is the function of the courts, not of the agency of "adjustment." The fact that an agency of adjustment has been established by Congress does not, therefore, indicate any intention on the part of Congress to preclude resort to the courts and thereby prevent the enforcement and protection of legal rights.

It seems clear, both from the language of this Court quoted above and from an analysis of the provisions of the Railway Labor Act, that that Act, in establishing a machinery of adjustment through the National Railroad Adjustment Board, did not intend that machinery to be exclusive or compulsory, as the respondents' argument assumes. The argument that the possibility of resort to the courts by the carriers would render the Railway Labor Act unworkable assumes that it is the purpose of that Act to preclude such resort to the courts and to render the adjustment procedure exclusive and compulsory, and

that this purpose would be defeated, as of course it would be, by permitting a judicial determination by the courts of the legal issues involved. But the decisions of this Court in both the *Moore* case (see pages 53-66 above) and in *Penna. R. R.* v. *Labor Board, supra,* make it plain that the machinery of adjustment provided in the Railway Labor Act was not intended to be compulsory or exclusive.

Although it is, therefore, clearly untenable to contend that Congress, by the establishment of adjustment procedure in the Railway Labor Act, intended to oust the jurisdiction of the judicial courts, nevertheless respondents have sought to derive some benefit from that contention by arguing that Congress must be held to have at least intended to minimize access to the courts, and, from this supposed intention to minimize access to the courts, respondents then seek support for the further inference that a Congressional intent to foreclose access to the courts, except through the statutory suit provided by Section 3 First (p) of the Act, must be supposed. In making this argument, respondents have throughout suggested that any other construction would interfere with the "workability" of the Act, as allegedly intended by Congress. In other words, their contention is that, if the employer is held to be entitled to a judicial determination of his contract rights and obligations in a proceeding brought on his own initiative, and is not confined to the illusory opportunity of such determination in a suit which theoretically might be, but in fact never will be, brought by the employes under Section 3 First (p) of the Act, then the provisions of the Railway Labor Act will be rendered unworkable and the operation of the Act, as supposedly intended by Congress, will be interfered with and hampered. By what process of reasoning can such a conclusion be reached?

The underlying thought of the respondents, in arguing that the Railway Labor Act would be rendered unworkable and its operation interfered with if such a suit as

is here involved were permitted, can only be based upon a theory of the Act which holds that its purpose and intent is primarily to clear the way for the operation of the economic bargaining power of the employes. Respondents, in some of the contentions which they advanced below, apparently assumed that the normal and proper sanctions of the Railway Labor Act, particularly as respects the orders of the Adjustment Board, consist in the "bargaining power" of the employes. As respondents have argued, "the orders of the Board find their primary sanction in the collective economic bargaining power of the employees." (Defendants' Memorandum Brief, p. 37, R. 103.) In other words, the argument of respondents is apparently that the procedure under Section 3 First (p) must be held to be exclusive in order that the employer may be placed in a position where the "economic bargaining power" of the employes, through their right to strike, can be enforced against it in a way which would not be possible if it was permitted access to the courts on the employer's own initiative, and that this result is necessary to give "effectiveness" to the awards of the Adjustment Board and so make the Railway Labor Act workable.

Assuming, as respondents do, that the "economic bargaining power" of the employes is the true sanction for enforcement of the awards of the Adjustment Board, the purpose of holding that Section 3 First (p) provides an exclusive judicial remedy is simply to subject the employer "effectively" to that "economic bargaining power," and to give him no way of escape therefrom by submitting his legal rights for adjudication to a court of law. Respondents frankly assume that the Railway Labor Act must be construed as evidencing an intention on the part of Congress to accomplish the foregoing result, viz., that it was the intention of Congress to subject the employer to economic pressure, and that in order to accomplish this result the employer must be held to have no other

opportunity for a judicial determination of his rights than the illusory one afforded by Section 3 First (p). From the standpoint of this construction of the Act, they contend that the exclusive character of the judicial remedy under Section 3 First (p) forms what they call an "integral part of the whole Congressional plan." (Defendants' Memorandum Brief, p. 36, R. 102.)

If the Congressional plan and policy under the Railway Labor Act of 1934 should be held to be what respondents thus contend that it is, then that plan amounts to nothing less than the surreptitious establishment of a scheme of compulsory arbitration of a novel and unprecedented character, and represents a complete revolution from the plan embodied in previous Railway Labor Acts.

There is nothing in the legislative history of the Railway Labor Act of 1934 to indicate that Congress thought it was effecting any such revolution in its previous policy. If the Act should be found to have accomplished such a result, it was accomplished without the conscious intent, or even knowledge, of Congress. The reports of the House and Senate Committees recommending the enactment of the Railway Labor Act of 1934 presented that Act as intended to cure two supposed defects in the Act of 1926, viz., failure to establish adjustment boards, and lack of any provision for an umpire in the event that an adjustment board deadlocked.* No statement was made that there was in contemplation any essential change in the nature or functions of the adjustment boards, or in the legal status of their awards.† At the same time, without any discussion in the Committee reports or on the floor of either House,‡ there was added Section 3 First (p), which

* See House Report No. 1944 and Senate Report No. 1065, 73d Congress, Second Session.

† In fact the House Committee in its report specifically stated that "the bill does not introduce any new principles into the existing Railway Labor Act." (P. 2 of House Report No. 1944, 73d Congress, Second Session.)

‡ See Congressional Record for June 15, 1934, Vol. 78, Pt. 11, at pages 11710-20, and Congressional Record for June 18, 1934, Vol. 78, Pt. 11, at pages 12369-76, 12384-88, and 12389-402.

simply purported to provide a specially favorable form of remedy through which employes might enforce in the Federal courts claims which had won the support of the Adjustment Board. Respondents are now taking the position that these provisions of Section 3 First (p), which found their way into the bill without even the honor of special mention by the Congressional Committees, and without any discussion on the floor of Congress, must be given a construction which, if adopted, would have the effect of substituting for the informal "adjustment" procedure of previous statutes a scheme which amounts to a novel system of compulsory arbitration. To assume that Congress, in enacting the Railway Labor Act, in fact intended to establish any such system of compulsory arbitration is contrary to the decision of this Court in *Moore* v. *Illinois Central R. Co.* (see pp. 53-66 above), and also its decision in *Penna. R. R.* v. *Labor Board, supra* (see pp. 80-81 above).

Respondents' argument in the courts below was in substance that the policy and intent of the Railway Labor Act in its present form is to permit the employes to force the employer into a proceeding before the Adjustment Board without the employer's consent, and, after that Board has made its award, the "effectiveness" of the award is protected, respondents contend, against judicial interference by excluding the controversy from judicial examination unless the employes, having won before the Board, elect—as in fact for good and sufficient reasons they never do—to bring a suit under Section 3 First (p), instead of preferring to rely on their "collective economic bargaining power" which they claim to be the "primary sanction" of the award.

This is clearly compulsory arbitration of a novel and extraordinary kind, especially in view of the nature of the controversies which are subjected to it. The controversies which under the Railway Labor Act may be submitted to

the National Railroad Adjustment Board are disputes growing "out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" (Section 3 First (i)). In other words, they are disputes which involve the interpretation of contracts and the determination of the respective rights and obligations of the parties. Such questions are fundamentally legal ones. When two parties make an agreement, there is no true contract unless each party assumes a legal duty to abide by the terms of the contract in accordance with the meaning of those terms as interpreted according to rules of law. Each party has a legal right to look to the other for such compliance. He has given consideration on his own part for the right to demand such compliance on the part of the other. If, while the contract is still in force, he can be told with finality that he is no longer entitled to demand such compliance, but must accept performance of a different kind, or must give other and different consideration for continued compliance, the original agreement cannot be said to have been a contract in any true sense. It affords no basis for reliance and reasonable expectation, and performs no function in defining reciprocal rights and obligations.

It is clear, from the respondents' discussion in the courts below of the functions and methods of operation of the Adjustment Board, that in their view that Board does not undertake to adjudicate or determine the legal rights and obligations of the parties under their contracts at all, and that its awards do not even purport to be based upon those rights and obligations. As respondents have stated below:

> "*The jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement.* The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.

"The function of a court is to render a judgment between parties who are before it as litigants. Such a judgment has the effect of establishing the parties' present rights. *With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary.* It is a matter of common knowledge that while the adversary character of the proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts. The parties before it, carrier and employees, are parties to a continuing relationship. *The future of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption."* (Defendants' Memorandum Brief, pp. 66-67, R. 132-133.)

From this statement of respondents as to the functions of the National Railroad Adjustment Board, which petitioner accepts as an accurate description of what the Board does, and of the way in which it views its own functions, it is plain that the Board, in the exercise of the power conferred upon it by Section 3 First (i) of the Railway Labor Act to decide disputes growing out of the interpretation of agreements, does not purport in its decisions to give effect to the actual meaning of the agreements, or to determine rights and obligations in

accordance with the terms of the agreements, but that on the contrary its awards may disregard those terms and completely alter the rights and obligations of the parties thereunder, if in the opinion of the Board to do so would promote the future cordial relations of the parties. This being so, it is entirely possible that an award of the Board in a dispute growing out of the interpretation of a contract may abolish the obligations of one party to the contract and may impose on the other new obligations not contained in the contract. Obviously such an award, which settles a dispute concerning the interpretation of a contract by disregarding the contract, is not a determination of contract rights, and, if parties to a contract are placed by the provisions of law in a position where they have no recourse but to submit to such awards, then the contract in question ceases to be a contract in any proper legal sense and becomes a bare interchange of words.

Agreements or contracts arrived at by collective bargaining between railroads and their employes will be reduced to this state of practical nullity if the Railway Labor Act should be construed to embody such a scheme of compulsory arbitration, as respondents contend. The effect of their contention if adopted by this Court would be to hold that final and conclusive power to interpret and apply such agreements is vested in a body which is in fact not bound by the agreements but may depart from or disregard them altogether in making its decisions. This would indeed be a novel and extraordinary form of compulsory arbitration. Surely, such a construction is not to be placed upon the Railway Labor Act without some clear and unmistakable indication that it was intended by Congress; and, as already shown, there is no such indication, or any indication, of such an intent in either the language or the legislative history of the Act. On the contrary, the conclusion is inescapable that there is no ground whatever for the contention that to allow

the judicial relief prayed for in the present proceeding would be to construe the Act in a manner contrary to its policy, or in a manner which would render it unworkable.

CONCLUSION.

Petitioner submits that in the above argument it has shown:

First, the decision of the majority of the Court of Appeals below places upon the Railway Labor Act a construction which is not warranted by anything in the language or legislative history of the Act, and is unreasonable, because it gives to that Act an operation which, on the facts of the case, compels a carrier-employer to submit to the "adjustment" by a non-judicial body of the legal rights and obligations of such carrier-employer under a contract with its employes, and then, after such adjustment, deprives the carrier of any real or effective opportunity for a judicial determination of such rights and obligations;

Second, the exercise of declaratory judgment jurisdiction is appropriate in this case and is not barred by any statutory impediment, and the majority below, in concluding otherwise, have made the mistake of assuming that Section 3 First (p) of the Railway Labor Act must, in order to preserve to the employes advantages which Congress intended them to have under that Section, be construed to exclude any other proceeding, such as the present one, for the judicial determination of the rights and liabilities of the carrier and its employes under their contract, whereas the fact is that the institution of a proceeding like the present one, for a declaratory judgment, would not in any way bar the employes from instituting a proceeding under Section 3 First (p) of the Act and thereby securing for themselves any advantages which Congress may have intended them to have thereunder;

Third, the decision of the majority of the Court of Appeals, in so construing the Railway Labor Act as to give the adjustment procedure provided therein a compulsory effect in its practical operation, is in conflict with the reasoning in *Moore* v. *Illinois Central R. Co.,* wherein this Court held that such adjustment procedure constituted a purely voluntary, non-compulsory system for adjustment and mediation, and the fact that petitioner appeared before the Adjustment Board in this case to defend itself against respondents' unilateral submission, without petitioner's joinder or concurrence, of the dispute to the Board, did not constitute a choice or voluntary election on petitioner's part of the method of adjustment provided in the Railway Labor Act, since such appearance in opposition to the respondents' unilateral submission was essential from petitioner's standpoint in order to avoid the default award which the Board would otherwise have entered against it;

Fourth, the construction given the Railway Labor Act by the majority of the Court of Appeals, whereby petitioner is precluded from obtaining a judicial determination of its rights in a declaratory judgment proceeding, and therefore, as a practical matter, from obtaining such determination in any proceeding, is to be rejected because it would render the Railway Labor Act of doubtful constitutionality;

Fifth, even if the Adjustment Board is conceded to be a quasi-judicial or administrative tribunal—which petitioner insists it is not—nevertheless, the policy established by this Court in its recent decisions, especially in *Rochester Telephone Corporation* v. *United States,* disposes of the contention that the issues determined by the Board should not be subject to judicial review, and makes it clear that the declaratory judgment procedure is appropriate for securing such review; and

Finally, to allow the judicial relief sought in this proceeding would not render the provisions of the Railway

Labor Act as intended by Congress unworkable, and is not forbidden by the "policy" of that Act, and respondents, in contending that the Act would thus be rendered unworkable, have presupposed a Congressional intent to establish a system of compulsory arbitration which would be novel and unprecedented in character, and which is in fact not disclosed as having been intended by Congress in any portion of the language of the Act or in any of its legislative history.

This case is of basic importance, not only because of the size and character of respondents' claims, but also because of the operating practices involved, which petitioner, believing such practices to be essential to the efficiency of its operation and desirable in the public interest, should not be compelled to change until its obligation to do so has been judicially determined. The continuation of such operating practices, and other like operating practices, may give rise to additional and increasingly numerous claims of the same nature, on the part of these or other similarly situated employes, and with respect to such claims petitioner and other carriers in petitioner's position will be without practical means of obtaining a judicial determination of the rights and liabilities of the parties if the relief herein sought is not granted. If the decision of the majority of the Court of Appeals below is permitted to stand, a strong element of unfairness and unreasonableness will have been injected, in the name of the Railway Labor Act although without any indication of Congressional approval or intent, into the relations between carriers and their employes.

Respectfully submitted,

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIZER,
1740 Broad St. Station Bldg.,
Philadelphia, Pa.
Counsel for Petitioner.

SEPTEMBER 25, 1942.

FEB 20 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 28.

THE WASHINGTON TERMINAL COMPANY,
Petitioner

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER ON REARGUMENT.

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIZER,
1740 BROAD ST. STATION BLDG.,
PHILADELPHIA, PA.
Counsel for Petitioner.

FEBRUARY 20, 1943.

LANE & SCOTT, PRS., PHILADELPHIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 28.

THE WASHINGTON TERMINAL COMPANY,
Petitioner,

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER ON REARGUMENT.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 331-48), and the dissenting opinion of Mr. Justice Stephens (R. 348-81), were handed down on November 18, 1941, and are reported in 124 F. (2d) 235.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on November 18, 1941 (R. 382). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347, 43 Stat. 938).

STATUTES INVOLVED.

This suit is brought under and in acordance with the Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955, 28 U. S. C. 400 *et seq.*, as amended. The pertinent provisions thereof are as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Certain provisions of the Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151 *et seq.*) are involved because they have been relied on by respondents in the courts below. The portions of the Act principally concerned are Sections 3 First (i), (m), (p) and (q), which provide as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and

unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

• • • • • • •

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

• • • • • • •

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein

stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

QUESTIONS PRESENTED.

When this case was before the Court on original argument, petitioner in its brief filed September 25, 1942, stated the questions presented as follows:

1. Whether or not Section 3 First (p) of the Railway Labor Act is to be construed, in the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, in a case where such a proceeding would otherwise be appropriate.

2. Whether or not Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress

which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes.

3. Whether or not the conclusion of the court below, to the effect that the unilateral submission of a dispute by employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the court to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Railway Labor Act, gives to the Railway Labor Act a construction which is unreasonable and is inconsistent with the construction placed upon it by this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941), wherein it was held that the procedure provided by the Railway Labor Act for the adjustment of such disputes was not intended to be exclusive.

4. Whether or not, in the face of Article III, Section 1, of the Constitution of the United States, and of the due process clause of the Fifth Amendment to the Constitution, a construction of the Railway Labor Act, and more specifically Section 3 First (p) thereof, is to be chosen which would have the effect of making the awards of a non-judicial body, like the National Railroad Adjustment Board, to all practical purposes final and conclusive save at the option of the employes, and which would have the effect of closing the doors of the courts to railroad employers with the result of subjecting them to economic pressure in order to compel them to comply with such awards.

5. Whether or not, even if the National Railroad Adjustment Board is for the purpose of argument conceded to be a public quasi-judicial or administrative tribunal, the right of a party adversely affected by action of the Board, to a judicial reconsideration of the controversy passed upon by the Board, is to be denied, despite the policy of protecting the right to judicial review established by this Court in its recent decisions, especially in *Rochester Telephone Corp.* v. *United States,* and despite the fact that all the requisites for assertion of such right to review, as enunciated in those decisions, are satisfied in the case at bar.

After the original argument, when this Court made its order of November 16, 1942, restoring the case to the docket for reargument, that order of the Court contained the following direction:

> "On the reargument counsel are requested to include in their briefs and oral argument a discussion of the following questions:
>
> "1. Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts, either before or after submission of the dispute to the Board;
>
> "2. Whether the Board may make an award ex parte if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award;
>
> "3. The effect of the expiration of the two-year period specified by Section 3 First (q) upon the right of either party to the dispute to obtain a determination of it in the courts;
>
> "4. The effect of the words 'final and conclusive' in Section 3 First (m) upon the right to resort to the courts and upon the scope of judicial review, (a) during the two-year period, and (b) after expiration of the two-year period."

STATEMENT.

Petitioner is a corporation which, since 1907, has operated the Union Passenger Station, including an adjacent railroad yard and tracks, in Washington, D. C. Respondents are petitioner's employes, who man its switch engines as engineers and firemen. The facilities of the passenger station and the adjacent yards and tracks are used by The Pennsylvania Railroad Company, the Baltimore & Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Cheseapeake & Ohio Railway Company—called the Tenant Lines—which operate passenger trains to, from and through Washington. The petitioner itself operates no passenger trains and employs no road-engine or road-train crews.

It has been the continuous operating practice at the Terminal, since it was opened for use in 1907, that, when a loaded passenger train comes into the station at the end of its run and has discharged its passengers at the platform, the road-engine, manned by the road-engine crew which brought the train in over the road, may haul the empty passenger cars to the storage yard en route to the round-house, whenever, in the judgment of petitioner, the efficient and prompt operation of the Terminal is thereby promoted. Similarly, when the preparation of a passenger train to leave Washington is called for, the road-engine, manned by the crew which will operate the train over the road, picks up the empty cars on its way from the engine-house to the station, and backs the train of cars to the platform to receive passengers preparatory to leaving on its trip, whenever efficiency and promptnes of operation so require. These road-engine crews are employes of the Tenant Lines. (Complaint, Pars. 8, 9, 10; R. 5.)

On February 1, 1923, a collective agreement in writing was entered into between petitioner and its yard-engine

employes, the class of employes to which respondents belong. (Complaint, Par. 15; R. 6.) This agreement contained, among other things, provisions regarding so-called "seniority rights" of the employes, which were substantially the same as those which had been contained in the contracts of employment between petitioner and its yard employes since June 1, 1910. (Complaint, Pars. 12, 13, 14, 15; R. 6; Exs. A. B. C. D; R. 15-39.) These "seniority rights" entitled employes to vacancies and new jobs in the order of seniority of the employes who applied for them, and also provided for seniority as a factor in promotion. This agreement, with some immaterial amendments made from time to time, is still in effect. (Complaint, Par. 16; R. 7.)

After these agreements, containing substantially the same terms, had been in effect for many years, petitioner's yard employes advanced the contention out of which the present application for a declaratory judgment ultimately eventuated. That contention was to the effect that the agreement of 1923, by according "seniority" rights to yard-engine employes, thereby conferred upon such employes by necessary implication a monopoly or exclusive right to perform without exception all work on petitioner's premises capable of being regarded or defined as "yard work," and that such "yard work" must be construed as including the work of moving empty passenger trains between the station and the storage yard—this despite the fact that, at the time of the original grant of seniority in 1910 and thereafter, both before and subsequently to the contract of 1923, such work had, under the practice and usage of the Terminal, continuously been performed by road engines of the Tenant Lines manned by road crews. (Complaint, Par. 19; R. 8.) In opposition to this contention, petitioner has consistently maintained that the 1923 agreement cannot lawfully be construed to confer on such employes any exclusive right to do the work claimed, in view of the practice known to, and

understood by, the parties before and at the time when that agreement was made and since that time, in the light of which practice the contract must, on universally accepted principles of general contract law, be interpreted. (Complaint, Par. 32; R. 12.)

After this controversy originated and the yard employes' claims had been rejected by petitioner, the employes without the concurrence or consent or participation of petitioner submitted the claim to the First Division of the National Railroad Adjustment Board. This Board was created by the amended Railway Labor Act enacted by Congress in 1934.

That Act set up the National Railroad Adjustment Board for the "adjustment" of disputes between carriers and their employes arising out of contracts with respect to rules, rates of pay and working conditions. The Board is composed of a number of Divisions. The First Division consists of ten members, five selected by the railroads and five by the national railroad labor organizations. The Act designates the First Division as the one to hear disputes between the carriers and their train and engine service employes. (Complaint, Par. 19; R. 8.)

In accordance with the Board's practice, the First Division, upon receiving the claim of petitioner's yard employes, notified petitioner to file a statement of its position within 30 days, and thereafter fixed a date for the appearance of petitioner and the representatives of the employes. Under the Railway Labor Act (Section 3 First (i)), the Board was authorized to render an award at the request of one of the parties alone, and therefore petitioner was obliged to appear before the Board and separately state its contentions in opposition to the claims, at the risk of otherwise having an award or order of the Division entered against it by default. (Complaint, Pars. 19 to 22, inc.; R. 8.)

At the so-called "hearing" before the Division, witnesses could not be called and evidence could not be intro-

duced because the rules of the Division forbade it. (Complaint, Ex. E; R. 40-43.) Thereafter, the Division was apparently unable to reach a decision because of the deadlock of its members, and, under the provisions of the Railway Labor Act (Section 3 First (l)), a Referee was appointed to sit with the Division and break the deadlock. In accordance with the Division's established practice, no opportunity was given petitioner to appear before the Referee or present to him written or oral arguments on the facts or the law. With the participation of the Referee, the Division decided the claim in favor of the employes, and, on October 24, 1938, it issued an "award" sustaining the claim. (Complaint, Pars. 24, 25, 26; R. 9.)

Petitioner, believing the award to be erroneous in point of law and not required by or in accord with the agreement of 1923, did not change its operating practices to conform to the award. Within a month after the date of the award respondents began to present, and have continued to present, claims and demands upon petitioner for sums of money that they allege they would have earned had they been permitted to perform the work which they claim they have a right to perform under the contract, but which is being performed by road-crews of the Tenant Lines. These claims for payments have been made notwithstanding the fact that many of respondents are and have been, during the period for which the claims are presented, actually engaged in performing yard work in and about the Terminal for which they are already receiving and have received full daily wages. Their demands amount to claims for wages which they contend they should be permitted to earn for performing work now being done by the road-crews of the Tenant Lines, in addition to the wages which they are actually earning. (Complaint, Par. 29; R. 11.)

The Railway Labor Act (Section 3 First (p)) authorizes a person for whose benefit an award by a Division of the Adjustment Board has been made to bring a pro-

ceeding to enforce the rights declared in the award in an appropriate United States District Court, "within two years from the time the cause of action accrues under the award" (Section 3 First (q)). No suit on the award in question has been instituted against petitioner. The Railway Labor Act makes no provision for a statutory method whereby the carrier against whom an award has been made by the Board can invoke the jurisdiction of the courts to determine the validity or legal effectiveness of the award.

The demands of respondents, if conceded in full by petitioner, would require the payment by it of a total amount of approximately $80,000 a year. Petitioner, in addition to being pressed by respondents for payment, was confronted with the dilemma of having to decide between complying at once with the award and thereby waiving all opportunity for judicial determination of its rights and obligations under the contract of 1923, on which the award was purportedly based, or waiting until such time as respondents might choose to sue on the award, in which event petitioner might be compelled to pay the full amount of wages claimed by respondents for work not performed by them, up to the time of suit, in addition to the wages paid to other employes for performing that work. (Complaint, Pars. 28-32; R. 10-13, 57.)*

In other words, if the carrier, faced with an award against it of the kind involved in the present suit, should refuse to comply with the award and at the same time had no opportunity for initiating a proceeding for judicial

The fact that petitioner does actually pay for the services of the road crews in performing this work, in the form of reimbursement of the Tenant Lines whose employes the road crews are, is admitted by respondents in their Answer filed in the District Court below, where respondents, speaking of the services of the road crews of the Tenant Lines in moving empty and loaded cars in petitioner's yards, said: " * * periodically the plaintiff is required to pay, and does pay to the Tenant Lines, sums equal to the reasonable value of said services" (R. 57). See also discussion in Judge Stephens' dissenting opinion (R. 367), answering discussion in the opinion of the majority of the Court of Appeals (R. 343-44).

determination of its obligations under the contract on which the award was purportedly based, the employes might wait until the last day of the two-year period before bringing an enforcement suit, in which event, if the enforcement suit were successful, the carrier would be obliged to pay for all the work in question done during the two-year period, as well as for the work done prior thereto since the presentation of the employes' claims, and to pay twice over for such work—once to the employes who in fact performed the work and a second time to the claimants who claim the right to perform the work but did not in fact do it. These circumstances would inevitably constitute a steadily increasing pressure on the carrier to comply immediately with the award by changing its operating practices and thereby reducing the damages to the amount of back wages accruing to the claimants up to the date of such change.

The experience of rail carrier-employers generally under the Railway Labor Act indicated that respondents would not sue promptly or at all on the award but would allow the full pressure of the circumstances to operate, reinforced by exertion of their own economic power, through threat of a strike, for the purpose of obtaining from the carrier full compliance with the award without a judicial determination of the basic rights and liabilities of the parties under their contract.*

Accordingly, petitioner, being desirous of having its rights under the contract judicially determined and having no other method open to it of achieving that result, instituted this suit under the Declaratory Judgments Act to obtain a judicial determination and declaration of its rights and liabilities under the contract of February 1, 1923. (Complaint, Par. 33; R. 13.)

Respondents, in the first defense set up by their answer, alleged that the complaint failed to state a cause of action. In the second defense of their answer, respondents

* See below, pp. 102-23.

contended—apparently because the complaint showed on its face the proceedings before the Adjustment Board—that:

> "(1) The Complaint fails to show the existence of an actual controversy between the plaintiff and the defendants.
>
> (2) The Complaint affirmatively shows that there exists a remedy especially provided by statute for this type of case.
>
> (3) The Complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure a judicial review of a decision of an administrative Board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act.
>
> (4) The Complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff." (R. 55.)

On the grounds thus alleged in the first and second defenses, the District Court, treating these defenses as a motion to dismiss, entered an order dismissing the complaint (R. 326). Petitioner appealed to the Court of Appeals, and that Court, after considering the case for nearly two years, affirmed the District Court in an opinion by Rutledge, *J.*, with Stephens, *J.*, dissenting (R. 331-81; 124 F. (2d) 235-77).

Thereafter petitioner on February 18, 1942, filed in this Court a petition for a writ of certiorari, which was allowed by order of this Court dated March 30, 1942 (R. 383). Briefs were filed by petitioner and respondents on September 25, 1942, and October 9, 1942, respectively. The case was called for oral argument on October 19 and 20, 1942, after which the Court on November 16, 1942, made its order restoring the case to the docket for reargument.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred:

(1) In holding that Section 3 First (p) of the Railway Labor Act is to be construed, despite the absence of express statutory language to that effect or any other indication of such a Congressional intent, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, where such a proceeding would otherwise be appropriate;

(2) In holding that Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer, with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes;

(3) In holding that the construction given by it to the Railway Labor Act, to the effect that the unilateral submission of such a dispute by the employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the courts to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Act, is not an unreasonable construction and is not inconsistent with the reasoning of this Court in *Moore* v. *Illinois Central R. Co.;*

(4) In holding that a construction of the Railway Labor Act which prevents the granting of the relief here sought by petitioner does not render that Act of doubtful constitutionality; and

(5) In affirming the judgment of the District Court below.

ARGUMENT.

Introduction and Summary: Statement and Discussion of the Questions Propounded by this Court and of their Relation to the Order and Scope of Petitioner's Argument.

The order of this Court directing a reargument of the case at bar broadens considerably the scope of the issues presented on the original argument, and specifically directs the inclusion in the brief of a discussion of several questions either not discussed, or discussed only in passing, in petitioner's original brief. Accordingly, in compliance with the Court's order, this amplified brief is presented for the purpose of including the additional matters on which argument is now directed.

At the same time petitioner respectfully desires to reiterate its arguments on the points discussed in its original brief, and to that end requests that that brief may be considered as incorporated by reference herein. This request is made because petitioner submits that the arguments presented in that brief cover points which are essential to a decision of the case.

In its original brief petitioner limited itself to contending that it was not precluded from access to the courts in the case at bar by the fact that the controversy at issue had already been submitted to the National Railroad Adjustment Board on behalf of the respondents and had been the subject of an award by that body. Petitioner did not undertake to argue the question whether or not it would have had a right to seek a judicial determination of the dispute, if the dispute had never been submitted to the Adjustment Board, or at any time prior to such submission. This was because petitioner considered that that point had already been decided in the affirmative by this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941). In the Court of Appeals below, where argument was had before the

decision of this Court in the *Moore* case was announced, that point was fully argued. When the Court of Appeals, however, came to render its decision in the instant case, the *Moore* case had already been decided here, and the Court of Appeals regarded itself as bound by that decision, saying (pp. 238-39 of 124 F. (2d); R. 331-32):

> "The decision in *Moore* v. *Illinois Central R. Co.*, 1941, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, rendered since this case was argued, has put beside the point much of the argument here. The case held that the Railway Labor Act does not preclude an employee from bringing a suit for damages for alleged wrongful discharge contrary to a collective agreement. The plaintiff employee, however, had begun his suit before the administrative machinery had been set in motion. *The decision establishes that in such circumstances the Act has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method.* At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial, without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms.
>
> "But the *Moore* case neither presented nor decided the question whether, when one party has put the adjustment procedure in operation, the other may disregard it entirely and at any subsequent stage have a judicial determination of the issues other than that provided by the Act." (Emphasis supplied.)

This Court now requests argument on the point supposed by the court below to have been determined in the *Moore* case. This request is clearly implicit in the phrase-

ology of the first question listed in the Court's order directing reargument, as appears from the italicized words in that question as reproduced below:

> "(1) Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts, either *before* or after *submission of the dispute to the Board.*"

In response to this question petitioner will contend in the following discussion that the *Moore* case was rightly decided, and that that case establishes, in conformity with precedent and principle, the proposition that before a dispute is submitted to the Adjustment Board neither party is precluded from seeking a determination of the dispute by the courts.

Petitioner bases this contention on three grounds:

> (1) It is supported by the unanimous course of precedent prior to the decision of the *Moore* case;
>
> (2) The supposed analogy of the "primary jurisdiction" doctrine, developed in connection with the Interstate Commerce Commission, has no valid application to the National Railroad Adjustment Board;
>
> (3) An opposite conclusion would in substance mean that the 1934 amendments to the Railway Labor Act must be construed as effecting a complete and radical change in the character and legal effect of the adjustment procedure for handling railway labor disputes, in the face of a complete absence of anything in the language or legislative history of the Act to show that Congress intended such a result.

The foregoing argument will be developed below in the first main section of this brief, and is offered as

petitioner's answer to that part of the Court's first question which relates to whether or not a dispute may be submitted to the courts *before* submission to the Adjustment Board. The second part of the Court's first question, which relates specifically to the point involved in the case at bar, viz., whether either party may seek a judicial determination of the dispute *after* its submission to the Board, will be postponed for discussion in this brief until after the Court's second question has been dealt with, viz.:

> "(2) Whether the [Adjustment] Board may make an award ex parte if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award."

This order of discussion is adopted because petitioner submits that the answer to this question is necessarily preliminary to the consideration of whether or not an Adjustment Board award must be treated as interposing a bar to subsequent judicial proceedings. This is for the reason that, if, as will be shown below, the Board may and in fact does make an award *ex parte* where one party to the dispute fails to appear before the Board, then the employes may in effect compel submission of the dispute to the Board and may thereby bar the employer-carrier from a judicial determination of its rights, unless it is held that the employer is not precluded from seeking a determination of the dispute by the courts in a proceeding like the present one after the dispute has been submitted to the Board and has become the subject of an award by the Board.

Accordingly, after developing in the second section of this brief the foregoing answer to the second question of the Court, petitioner will proceed in the third section of the brief to discuss the second part of the Court's first question, viz.:

"Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts • • • *after submission of the dispute* to the Board."

This is the question which is specifically raised by the facts of the case at bar, and which is now before this Court for decision.

First of all, it is to be noted that the statute itself in Section 3 First (p) answers this question in the negative so far as the right of the employe to bring a subsequent suit is concerned, at least where the award of the Board is in his favor. The statute thus shows that there is no complete or inherent incompatibility between a subsequent judicial determination of the controversy and a prior award by the Adjustment Board. The sole question is whether the statutory creation of a special judicial procedure for the benefit of the employes in Section 3 First (p) of the Act must be so construed as necessarily to deny to the employer altogether the recourse which it otherwise would have to the courts.

This is the question to which petitioner's original brief was addressed. For the convenience of the Court parts of that brief will be reproduced in the third section of the following argument.

Petitioner will contend in that section that a construction of the Railway Labor Act would be unreasonable and arbitrary which would preclude the employer from access to the courts merely because of prior action by a wholly non-judicial body of the character of the Adjustment Board, and that such a construction is not required either by Section 3 First (p) or by the Act as a whole, interpreted in the light of its legislative history and policy. To permit the present suit to be maintained would not deprive the employes of any advantages which Congress may be thought to have intended to confer on them by the enactment of Section 3 First (p), and alleged statu-

tory analogies requiring a contrary result are not applicable. At the same time an argument from a supposed "policy" of the statute which would defeat the present suit would be inconsistent with the principles announced by this Court in the *Moore* case, and would read into the statute a scheme of compulsory non-judicial "adjustment" which would deny to the employer altogether the protection of its contract rights.

In developing the discussion outlined in the preceding paragraph, petitioner will contend that to allow the present action to be maintained will in no way impair any of the advantages conferred on the employes by the special procedure set up for their use under Section 3 First (p) of the Act. If this is the case, then there is no reason to exclude the employer from access to the courts during the two-year statutory period in which the employes have the right to take advantage of that procedure, since such a result is not needed for the protection of the employes' right during that two-year period. Accordingly petitioner will at this point proceed to a discussion of the third question propounded in the Court's order, viz.:

> "(3) The effect of the expiration of the two-year period specified by Section 3 First (q) upon the right of either party to the dispute to obtain a determination of it in the courts."

Petitioner's answer to this question will comprise the fourth main section of this brief.

In the fifth section of the brief petitioner will discuss the Court's fourth question, viz.:

> "(4) The effect of the words 'final and conclusive'* in Section 3 First (m) upon the right to resort to the

* In this connection it should be noted that, although the Court's order of November 16, 1942, refers in the fourth question to the words "final and conclusive," as if such words were intended to be quoted from Section 3 First (m) of the Railway Labor Act of 1934, examination of that paragraph of the Act shows that the phrase which the Court apparently had in mind appears in that paragraph as "final and binding," and not "final and conclusive."

courts and upon the scope of judicial review, (a) during the two-year period, and (b) after expiration of the two-year period."

In the sixth and final section petitioner will point out that to read into the Railway Labor Act by implication a construction which would prevent the petitioner from maintaining this suit would in substance and practical effect give finality to an award of the Adjustment Board, although such an award is arrived at by neither judicial nor quasi-judicial methods and embodies a so-called "adjustment" that may be made in complete disregard of the parties' contract rights, and that to give effective and practical finality to such an award is at variance with elementary principles of procedural fair-play which have always been recognized and applied by this Court in its decisions; and it should not be of significance that the compulsion or coercion which would give such finality to awards of the Board is merely, as contended by the respondents, "extra-legal compulsion" or "compulsion in fact," as distinguished from compulsion through the operation of legal penalties. However, it will be shown that the compulsion in question does in fact proceed from provisions of the Railway Labor Act and that accordingly the abstract and formal distinctions which respondents attempt to draw between "compulsion in fact" and "legal compulsion," and upon which their whole case ultimately rests, is not a distinction which has any valid application in the case at bar. Petitioner will also point out that a construction of the Railway Labor Act which would prevent it from maintaining this suit would undermine the whole process of collective bargaining by depriving the contracts arrived at by such bargaining of their character and effectiveness as contracts and would reduce them to mere scraps of paper.

The order of presentation which will be followed in this brief may, therefore, be summarized as follows:

Section I will be an answer to the first part of the Court's first question and will be presented under the caption:

> "Neither party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts before submission of the dispute to the Board."

Section II will be an answer to the Court's second question and will be presented under the caption:

> "Under the Railway Labor Act the Adjustment Board may and in fact does make an award *ex parte* if one party to the dispute does not appear before the Board, and such an award is given the same effect as an award made by the Board after both parties have appeared."

Section III will be an answer to the second part of the Court's first question and will be presented under the caption:

> "Neither party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute in the courts after submission of the dispute to the Board."

Section IV will be an answer to the Court's third question and will be presented under the caption:

> "The expiration of the two-year period of limitation specified by Section 3 First (q) of the Railway Labor Act for proceedings brought under Section 3 First (p) has no effect in restricting the right of either party to the dispute to obtain a determination of it in the courts in a proceeding not brought under Section 3 First (p), the restrictive effect of the two-year limitation being confined to the latter type of

proceeding; but on the contrary, the expiration of the two-year period should operate to permit a proceeding like the present one now to go forward even if the contention be accepted that it could not have gone forward during the two-year period."

Section V will be an answer to the Court's fourth question and will be presented under the caption:

"The words 'final and binding' in Section 3 First (m) of the Railway Labor Act cannot, consistently with other provisions of the Act, be construed as having any restrictive effect upon the right of either party to the dispute to resort to the courts or upon the scope of judicial consideration of the dispute either during the two-year period of limitation prescribed by Section 3 First (q) for proceedings under Section 3 First (p) or after the expiration of that period."

Section VI will point out the gravity from both the legal and the practical aspect of holding that this suit may not be maintained, and will be presented under the caption:

"To read into the Railway Labor Act by implication a construction which would prevent petitioner from maintaining this suit would violate elementary principles of procedural fair play which have always been recognized and applied by this Court in its decisions, and would also undermine the process of collective bargaining by depriving the contracts arrived at by such bargaining of their character and effectiveness as contracts and would reduce them to mere 'scraps of paper'."

SECTION I.

(Answer to the First Part of the Court's First Question.)

NEITHER PARTY TO A DISPUTE OVER WHICH THE ADJUSTMENT BOARD HAS AUTHORITY IS PRECLUDED FROM SEEKING A DETERMINATION OF THE DISPUTE BY THE COURTS BEFORE SUBMISSION OF THE DISPUTE TO THE BOARD.

The point raised by this part of the Court's first question is whether *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941), decided by this Court at the 1940 term in an opinion by Mr. Justice Black, was rightly decided. Petitioner submits that it was.

A. It Has Been Generally Held by the Decided Cases Prior to the Decision in the Moore Case that, Since the Enactment of the Railway Labor Act, and in Spite of the Provisions Thereof Establishing a Statutory Adjustment Procedure, Rail Carriers and Their Employes May Resort to the Ordinary Judicial Courts for the Enforcement of Contracts Between Them Respecting Rules and Working Conditions, Either by Action for Damages or by Bill for an Injunction or Declaratory Judgment.

It is plain from the decided cases that the courts have not hitherto regarded themselves as ousted by the Railway Labor Act of 1934 of jurisdiction to consider and determine disputes arising out of collective agreements between carriers and their employes which are of the kind that could under that Act be submitted to the National Railroad Adjustment Board for "adjustment." Since the enactment of the Railway Labor Act in its present form on June 21, 1934, cases have been numerous in which carriers or their employes have resorted to the courts and have been heard on the merits either in actions for damages or in injunction or declaratory judgment

proceedings to enforce rights claimed under contracts of the character which under the Act might have been submitted to the Board. Among such cases are the following:

Louisville & N. R. Co. v. *Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936) (suit for declaratory judgment construing a collective agreement between a railroad and its employes and declaring plaintiffs' seniority rights and other contract rights therein);

Florestano v. *Northern Pacific Ry. Co.*, 198 Minn. 203, 269 N. W. 407 (1936) (action for damages for alleged breach by railroad employer of a seniority agreement);

McCrory v. *Kurn*, 101 S. W. (2d) 114 (Mo. App., 1936) (action for damages for alleged wrongful discharge in violation of collective agreement);

McGee v. *St. Joseph Belt Railway Co.*, 232 Mo. App. 639, 110 S. W. (2d) 389 (1937) (action by employe against railroad employer for damages for loss of seniority rights claimed under a collective agreement);

Evans v. *Louisville & Nashville R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611 (1941) (suit by employes to restrain railroad from interfering with their alleged seniority rights);

Dooley v. *Lehigh Valley R. R. Co.*, 130 N. J. Eq. 75, 21 A. (2d) 334 (1941) (suit in equity by employe against the railroad and the brotherhood to compel restoration of the plaintiff's seniority status and recovery of lost wages, and to enjoin further alleged violations of contract);

Perras v. *Terminal R. Assn. of St. Louis*, 154 S. W. (2d) 417 (Mo. App., 1941) (action by employe against railroad employer for damages for loss of seniority rights claimed under a collective agreement);

Nord v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936, cert. den. 300 U. S. 673, 57 S. Ct. 612) (injunction suit to restrain railroad and certain employes from complying with an award of the Adjustment Board and thereby interfering with plaintiff's seniority rights under a contract with the railroad).*

It will be noted that most of these cases involved the same sort of problem on the merits as that involved in the present case, viz., interpretation of seniority provisions in a contract between the carrier and certain of its employes, and furthermore, that each such case (with the exception noted) was heard and decided by the court on the merits of the substantive problem involved.

In no reported case† has it been held that the courts were ousted of jurisdiction to interpret and enforce an agreement by the fact that the dispute with respect to the agreement was one which, under the provisions of the

* In the *Nord* case, the court granted the injunction not on the merits of the question of the interpretation of the contract but on the ground that the award of the Board was invalid as to the plaintiff, who received no notice of the Board's proceedings and whose seniority rights would have been impaired by compliance with the award; and, in answer to the contention that the court was deprived by the Railway Labor Act of jurisdiction to grant the relief sought, the court said (pp. 483-84 of 86 F. (2d)):

> "Nor do we believe that the Railroad Labor Act in any way limited the jurisdiction of the District Court as previously conferred by 28 U. S. C. A. §41 (1). Section 3, subdivision (p), of the Railroad Labor Act (45 U. S. C. A. §153 (p), provides: 'If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides, * * * a petition,' etc. *The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied.*" (Emphasis supplied.)

Certiorari was denied by this Court in that case (300 U. S. 673).

† In *Adams* v. *New York, C. & St. L. R. Co.*, 121 F. (2d) 808 (C. C. A. 7th, 1941), the District Court had dismissed a suit for a declaratory judgment defining plaintiffs' seniority rights as employes of the railroad, on the ground that exclusive jurisdiction with respect to such questions was in the Adjustment Board or the Mediation Board, but this decision was reversed by the Circuit Court of Appeals on the authority of this Court's decision in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941).

Railway Labor Act, might have been, but was not, submitted to the National Railroad Adjustment Board.

These cases illustrate and apply the elementary principle that, where a statute does not create a new and purely statutory right but simply provides a novel method of procedure for determining and enforcing a right which exists at common law by reason of contract or otherwise, the statutory remedy will be held to be merely cumulative and not exclusive, in the absence of express statutory language indicating a contrary intent. Of numerous decisions illustrating this familiar principle, the following may be cited:

King v. *Pomeroy*, 121 Fed. 287, 292 (C. C. A. 8th, 1903);*

Brewster v. *Rogers Co.*, 169 N. Y. 73, 80, 62 N. E. 164, 165 (1901);†

Rosin v. *Lidgerwood Manufacturing Co.*, 89 App. Div. 245, 247-8, 86 N. Y. S. 49, 51-2 (1903);

Tucker v. *Missoula Light & Ry. Co.*, 77 Mont. 91, 98, 250 P. 11, 14 (1926);

Cann v. *Williams Land & Livestock Co.*, 56 Nev. 242, 252, 48 P. (2d) 887, 890-1 (1935);

Petition of State ex. rel. Hutchinson, 182 S. C. 369, 374-5, 189 S. E. 475, 477 (1937).

It is of course clear that the Railway Labor Act does not create the substantive legal rights involved in the disputes for the "adjustment" of which it provides its

* Judge Sanborn stated the rule in that case as follows (p. 292): " * * * where a statute simply gives a new remedy in a case in which the right and an appropriate remedy existed before its enactment, it is cumulative, and not exclusive, and *the party injured is at liberty to pursue either remedy.*" (Emphasis supplied.)

† In that case the rule was stated by the New York Court of Appeals as follows (p. 165 of 62 N. E.): "The general rule is that, if a new right be given by statute, and a remedy for the invasion thereof be prescribed, the statutory remedy is exclusive; but *if there be an existing right and a common-law right of action for its violation, then the statutory remedy is only additional or cumulative.*" (Emphasis supplied.)

peculiar procedure, and no one contends that it does. Those rights arise out of contract and exist under common law. Respondents have not only admitted but have insisted that the rights in dispute in the case at bar are not created by the Act, but arise out of the collective agreement of 1923. Thus, in their memorandum brief in the District Court (Defendants' Memorandum Brief, p. 51; R. 117), they have stated that after the issuance of the award of the Board, as well as prior thereto, whatever rights they claim are based on the contract and not on the award or order of the Board. Their language is as follows:

> "These claims, however, are *based upon the Agreement of 1923—not upon the order of the Board.*" (Emphasis as in Defendants' Brief.)

And again at page 53 of the same brief (R. 119):

> "When the individual defendants presented to the plaintiff individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order (*i. e.*, of the Adjustment Board) which has no substantive effect and is in exactly the same position as to its substantive rights and obligations as it was before the order was issued."

Prior to the enactment of the Railway Labor Act of 1934, labor contracts of the character here in question, between carriers and their employes, formed the subject of controversy in the courts under the applicable principles of common law and equity, and the courts took jurisdiction of their interpretation and enforcement. Among a long list of such cases may be cited the following:

> *Grand I. B. of Locomotive Engrs.* v. *Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934) (suit to enjoin railroad and brotherhood from interfering with plaintiffs' alleged seniority rights by merger of two railroads);

Gary v. *Central of Georgia Ry. Co.*, 37 Ga. App. 744, 141 S. E. 819 (1928) (action for damages for alleged wrongful discharge in violation of a collective agreement);

Gregg v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920) (suit in equity for an injunction to restrain defendant railroad and its general manager from removing plaintiff from his position as conductor on a certain train);

Piercy v. *L. & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923) (suit for declaratory judgment construing agreement between employes and the railroad and declaring plaintiff's rights thereunder);

McGregor v. *L. & N. R. Co.*, 244 Ky. 696, 51 S. W. (2d) 953 (1932) (action by a telegraph operator against the railroad to enforce seniority rights under a contract between the railroad and telegraphic employes);

Donovan v. *Travers*, 285 Mass. 167, 188 N. E. 705 (1934) (suit in equity to compel recognition of the plaintiff's seniority rights);

George T. Ross Lodge v. *Brotherhood of Trainmen*, 191 Minn. 373, 254 N. W. 590 (1934) (suit in equity to restrain labor union and the Northern Pacific Railway Co. from interfering with plaintiff's seniority rights);

McCoy v. *St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934) (action for damages for breach of an agreement regulating seniority);

Rentschler v. *Missouri P. R. Co.*, 126 Neb. 493, 253 N. W. 694 (1934) (action to recover wages alleged to be due for a period during which plaintiff was out of work due to a reduction in forces —plaintiff alleged violation of a seniority agreement);

Unkovich v. *N. Y. Central R. R. Co.*, 128 N. J. Eq. 377, 16 A. (2d) 558 (1934) (suit in equity to compel recognition of the plaintiff's seniority rights); *Panhandle & S. F. Ry. Co.* v. *Wilson*, 55 S. W. (2d) 216 (Tex. Civ. App., 1932) (action for damages for alleged breach of an agreement covering seniority).

In view of these decisions and the principle which they illustrate, it is clear that rights under labor contracts derive from those contracts and not from the Railway Labor Act, and that all that that Act does is to provide, alongside the established legal remedies, an available procedure for informal settlement and adjustment of controversies.* It follows that, under the elementary

* The fact that no new substantive rights are created by the Railway Labor Act and that the substantive foundation for suits to enforce provisions in contracts between carriers and their employes is the contract itself and not the provisions of the Railway Labor Act is shown by a number of cases holding that, in the absence of diversity of citizenship or other recognized ground of Federal jurisdiction, an employe has no standing to seek enforcement of his contract rights in a Federal court, except in a suit brought in accordance with the provisions of Section 3 First (p) of the Railway Labor Act: *Lane* v. *Union Terminal Co.*, 12 F. Supp. 204 (N. D. Tex., 1935); *McDermott* v. *New York Cent. R. Co.*, 32 F. Supp. 873 (S. D. N. Y., 1940); *Swartz* v. *South Buffalo Ry. Co.*, 44 F. Supp. 447 (W. D. N. Y., 1942); cf. *Malone* v. *Gardner*, 62 F. (2d) 15 (C. C. A. 4th, 1932). In addition to the cases cited above (pp. 25-26), from the decisions of state courts which have assumed jurisdiction of disputes arising out of contracts between carriers and their employes notwithstanding the Railway Labor Act, the following may be cited as sustaining the proposition that the employes in such cases do have standing in the state courts to enforce their contract rights: *Stephenson* v. *N. O. & N. E. R. Co.*, 180 Miss. 147, 178-9, 177 So. 509, 519 (1937); *Long* v. *Van Osdale*, 26 N. E. (2d) 69, 74 (1940), affirmed without comment on this point, 218 Ind. 483, 29 N. E. (2d) 953 (1940). In the *Stephenson* case it was said (pp. 177-9 of 180 Miss.):

> "Neither the carrier nor the employee against whose interest an award has been made is given any right under the act to go into the United States District Court as a plaintiff or complainant. *Then, most assuredly the employees of a carrier against whose interest and seniority rights an award has been made are not left without remedy in all of the courts of the land.* * * * Hence, such an employee who has lost his cause before the Adjustment Board must necessarily resort to a State Court of competent jurisdiction, or lose the property rights involved in a seniority contract with his employer." (Emphasis supplied.)

principle referred to above, the statutory remedy provided in Section 3 First (p) of the Railway Labor Act should, in the absence of express statutory language to the contrary, be held to be merely cumulative and not exclusive of other remedies, since the Act does not create the substantive rights on which the suit is founded.

Plainly, if this Court should now hold that the availability of the adjustment procedure under the Railway Labor Act precludes resort to the courts by either party for determination of a dispute arising out of a collective agreement between a carrier and its employes, except in a proceeding under Section 3 First (p) after the issuance of an award by the Board with respect to that dispute, then this Court in so holding would be deciding in a manner inconsistent with the generally held view, as reflected in the decided cases, including the decisions of the courts of last resort of many states.

B. The Analogy of the So-called Doctrine of "Exhaustion of Administrative Remedies," or "Primary Jurisdiction" Doctrine, Which Requires That, in Certain Cases Where Administrative Procedure is Provided by Statute, Resort Must be Had to That Procedure in the First Instance as a Prerequisite of Access to the Courts, Has no Valid Application to the Adjustment Procedure of the Railway Labor Act, and Does not Require That the Moore Case Should Be Overruled.

In the opinion of the majority of the Court of Appeals below it is said that this Court's decision in the *Moore* case establishes that the Railway Labor Act

> "has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method." (R. 332; p. 238 of 124 F. (2d).)

The question is now raised by this Court whether the Railway Labor Act does make exhaustion of the so-called "administrative" remedy through the procedure of the Adjustment Board prerequisite to the exercise of jurisdiction by the courts over disputes which under that Act may be taken to the Adjustment Board. Petitioner submits that the Act requires no such prerequisite for judicial cognizance of disputes of that character, and that the decision in the *Moore* case is, therefore, correct. The interjection into this case of the doctrine of "exhaustion of administrative remedies," or the "primary jurisdiction" doctrine, as it is sometimes called, is inappropriate for two reasons: first, because the doctrine is not one of general but is of special and limited application; and, second, because the grounds upon which the doctrine is applied do not exist with respect to the National Railroad Adjustment Board.

1. The Doctrine of "Primary Jurisdiction" or "Exhaustion of Administrative Remedies" Is One of Special and Limited Application.

This doctrine, to which appeal is made for the purpose of overruling the *Moore* case, originated in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). In that case a shipper, without complaining to the Interstate Commerce Commission, brought suit in the courts against a carrier to recover for the payment of an allegedly excessive and unreasonable interstate rate. The rate in question was in fact published in a tariff which the carrier had filed with the Commission, as required by the Interstate Commerce Act, and from which the carrier was therefore, under that Act, not lawfully permitted to deviate. The question was whether, under these circumstances, the shipper was entitled to the judgment of a court as to the reasonableness of the rate or whether, under the Act, it was necessary that he should proceed through the Commission. He claimed that his right to

proceed through the courts in the first instance was a common law right of which the statute should not be construed to deprive him. In approaching that contention this Court, speaking through Mr. Justice White, used the following language (p. 437 of 204 U. S.):

> "A statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

The Court, therefore, proceeded to examine what would be the effect of the exercise of the right claimed by the shipper under the circumstances of the particular case, and went on to say (p. 440 of 204 U. S.):

> "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, *which the statute casts upon that body*, of seeing to it that the *statutory requirement as to uniformity and equality of rates is observed.*" (Emphasis supplied.)

In other words, in view of the statutory requirement of uniform rates and in view of the fact that the Commis-

sion was the body charged by the statute with protecting and preserving rates in accordance with that statutory requirement, it followed necessarily that any procedure which defeated the power of the Commission to maintain the required uniformity of rates would render the statutory mandate nugatory. Hence, it was held that a right to proceed in the courts in disregard of the procedure through the Commission was necessarily inconsistent with the provisions of the statute.

The ruling, in other words, was not to the effect that merely because there was an available procedure through an administrative body that procedure must be used to the exclusion of the procedure through the courts; it was only to the effect that where the procedure through the courts, rather than through the administrative body, would have some specific result in rendering nugatory a provision of the Act, like that which required uniformity of rates, the administrative procedure would to that extent be held to oust the jurisdiction of the courts.

It therefore seems clear that the primary jurisdiction doctrine or doctrine of the exhaustion of administrative remedies is not in any sense a doctrine of general application to administrative bodies as such, but applies only where special reasons exist for its application.

2. The Grounds Upon Which the Primary Jurisdiction Doctrine or Doctrine of Exhaustion of Administrative Remedies Is Applied Do not Exist With Respect to the Functions and Nature of the National Railroad Adjustment Board.

The doctrine of the *Abilene Oil* case has not been held to require that the courts should be ousted of jurisdiction generally over all controversies which may be brought before the Interstate Commerce Commission. In every case in which it has been applied, the ground for its application has been fundamentally that stated by Mr. Justice White in the passage above quoted, namely, the need for protecting the Commission in the performance of

its statutory obligation to maintain proper rate levels and to eliminate discriminations in rates and practices by insuring uniformity. Anything which interferes with this power of the Commission is necessarily an impairment of its administrative or regulatory authority and of its effectiveness in preserving the uniformity required by the statute, and accordingly, when any question arises of which the independent determination by a court might interfere with this regulatory or administrative authority of the Commission and with the effective exercise of its statutory function, it is of course held that the question must be decided by the Commission in the first instance. This is why certain special determinations of fact which are essential to the consistent application of the statutory standards committed to the Commission's enforcement are held to be necessarily for the primary determination of the Commission. That this requirement of consistency and uniformity in the application of statutory standards is at the basis of the doctrine is shown, for example, in the opinion written by Mr. Justice Brandeis for this Court in *Gt. No. Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477 (1922). Thus he says in that opinion (at page 291 of 259 U. S.):

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. • • • It is required because the enquiry is essentially one of fact and of discretion in technical matters; *and uniformity can be secured only if its determination is left to the Commission.*" (Emphasis supplied.)

And elsewhere in the same opinion, in explaining the decision in *Tex. & Pac. Ry.* v. *Am. Tie & Timber Co.*, 234 U. S. 138 (1914) (at p. 293 of 259 U. S.):

> "The only real question in the case was one of fact. • • • As that question, unlike one of construction,

> could not be settled ultimately by this court, *preliminary resort to the Commission was necessary to ensure uniformity.*" (Emphasis supplied.)

This language of Mr. Justice Brandeis illustrates with particular clarity the reason why prior resort to the Commission must be had in certain cases in order to preserve the required uniformity in the application of the statutory standards. Where the statutory standard is one of reasonableness, for example, or the prevention of discrimination in rates, determination of the question usually requires the weighing and analyzing of a mass of voluminous technical evidence bearing on highly complex fact issues, and it is obvious that in such a situation the required consistency and uniformity can be attained only by the application of the skilled judgment of a continuing body of experts "informed by experience" in the technical field in which the question arises.*

The fact that this is the basis of the doctrine of primary jurisdiction has been frequently pointed out in the opinions of this Court. Thus, Mr. Justice Brandeis in the opinion in the *Merchants Elevator* case, already referred to, used the following language, in referring to determinations as to reasonableness and unjust discriminations (p. 291 of 259 U. S.):

> "That determination is reached ordinarily upon *voluminous and conflicting evidence; for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.*" (Emphasis supplied.)

Again, this Court said, through Mr. Chief Justice Hughes, in *Board of Railway Commissioners* v. *Great Northern Ry.*, 281 U. S. 412, 50 S. Ct. 391 (1930), at pages 421-22 of 281 U. S.:

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* See *Illinois Cent. etc. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 454 (1907).

"The inquiry would necessarily relate to *technical and intricate matters of fact,* and the solution of the question would demand the exercise of sound administrative discretion. *The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision.* Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend." (Emphasis supplied.)

In *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.,* 215 U. S. 481, 30 S. Ct. 164 (1910), this Court referred, on page 496 of 215 U. S., to "the destructive effect upon the system of regulation devised by the act to regulate commerce" if it were construed as "giving authority to the courts, without the preliminary action of the commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body."

Clearly, the reasons thus stated in the cases cited above, and particularly by Mr. Justice Brandeis in the *Merchants Elevator* case, as the basis for the doctrine of primary jurisdiction, have no application to the present case. They have no such application because: (*a*) the body to which it is claimed in this case that preliminary resort must be had, viz., the Adjustment Board, is not, as is the Interstate Commerce Commission for example, an administrative or regulatory or quasi-judicial tribunal, and is not charged with the maintenance of a statutory standard, such as the uniform maintenance of railroad rates, which would be impaired by the exercise of jurisdiction by the courts without prior resort to the tribunal; (*b*) the decisions of the Adjustment Board do not proceed from the informed judgments of a continuing body of experts; and (*c*) questions decided by the Adjustment Board are not of the kind to which the primary

jurisdiction doctrine is applicable, since the Adjustment Board is not in any sense a fact-finding body and its conclusions are not reached as a result of weighing and considering evidence.

(a) *The National Railroad Adjustment Board is not, as is the Interstate Commerce Commission, an Administrative or Regulatory or Quasi-judicial Tribunal, and is not Charged with the Maintenance of a Statutory Standard, the Uniform Application of Which Would Be Impaired by the Exercise of Jurisdiction by the Courts Without Prior Resort to the Tribunal.*

The National Railroad Adjustment Board is in no sense a regulatory or administrative or quasi-judicial tribunal. It is simply an extremely informal body which makes decisions or awards, often through an outside referee, in controversies growing out of the interpretation of contracts. It has no statutory provisions to police and no statutory standards to apply. It is not charged by the statute with the duty of maintaining any uniformity of rates or practices or rules or working conditions. Unlike the Interstate Commerce Act, which specifically charges the Interstate Commerce Commission with the duty of securing uniformity of rates in its maintenance of the statutory standards of reasonableness and prevention of discrimination, the Railway Labor Act sets up no statutory standards to guide the Adjustment Board in its interpretations of the contracts brought before it.

It will be pointed out below (pp. 158-66) that the function of the Adjustment Board is primarily to suggest formulas for the voluntary "adjustment" or settlement of disputes growing out of contracts between particular employes in the railroad industry and their employers. It may of course be a proper part of the exercise of that function for the Board to consider and interpret the contracts giving rise to the disputes. But, in so far as the Board purports to make such interpreta-

tions, there is nothing in the Act that authorizes or requires the Board to attempt to maintain uniformity in its interpretation of contracts which are widely different as between different employers—as the contracts involved in disputes before the Board frequently are—or to be guided, in making such interpretations, by any considerations other than the terms of the contracts and their meaning, as disclosing the intentions of the parties, in accordance with ordinary principles of contract law. There is nothing in the Act to indicate that, when the Board purports to interpret such a contract, its interpretation should be different from the interpretation that would be placed on the same contract by the courts, and presumably there should not be any such difference, in the absence of any expression of Congressional intent in the Railway Labor Act that different principles of interpretation should be applied or that the contract should be altered without the parties' consent. Certainly no such Congressional intent is expressed in the Act or is indicated by any of its provisions.

Thus, the provisions of the Act setting up the Adjustment Board and defining its functions with respect to the "adjustment" of disputes growing out of contracts between carriers and their employes do not include any authorization to the Board to impose on the parties any interpretation of their contract different from that which an ordinary court would adopt. The conclusion that the statutory adjustment procedure must be employed, to the exclusion of the ordinary procedure which would be followed in the courts for the interpretation of these same contracts, neither appears from the face of the statute nor follows from the doctrine of the *Abilene Oil* case, the reasons for that doctrine being absent. That conclusion, as to the exclusive character of the statutory adjustment procedure, can be reached only by assuming the point to be proved, namely, that the Congressional intent as manifested in the Railway Labor Act would be frustrated by holding such procedure not exclusive.

The fact that the Adjustment Board was not intended by Congress to be charged with the maintenance of a statutory standard, the uniform application of which would be impaired by the exercise of jurisdiction by the courts without prior resort to the Board, is further demonstrated by limitations upon the Board's authority which appear upon the face of the Railway Labor Act. As pointed out above, the reason underlying the primary jurisdiction doctrine is that, where the maintenance of a statutory standard, involving the determination of technical and intricate questions of fact, is committed to the authority and discretion of a statutory tribunal, the desired uniformity and effectiveness in the maintenance of that standard would be impaired and interfered with if the courts were permitted in some instances, without prior resort to the statutory tribunal, to pass upon the same types of technical questions as those which were determined by the statutory tribunal in other instances. Thus, if Congress had intended the Adjustment Board to be the kind of statutory tribunal which the primary jurisdiction doctrine contemplates, it would have provided in the Act that the Adjustment Board should have authority to determine in the first instance all questions arising within the supposedly technical field in which the Board is claimed to have expert knowledge and experience.

But the Railway Labor Act shows on its face that Congress did not intend and did not provide that the Adjustment Board should have exclusive authority and discretion within any such field, and that on the contrary Congress expressly limited the Board's authority so as to exclude it in some instances from consideration of questions arising within that field, even though the questions raised in those instances might involve the same supposedly technical questions, growing out of the same or similar operating practices and agreements, as those involved in other instances in which the Board is authorized to act. Section 3 First (i) of the Act defines the disputes

of which the National Railroad Adjustment Board may take cognizance as "disputes between an employee or group of employees and a carrier or carriers." It therefore plainly excludes from the Board's consideration cases of disputes arising primarily between one employe or group of employes on the one hand, and another employe or group of employes on the other hand.* Again, in Section 3 Second of the Act provision is made for the establishment, by mutual agreement of a carrier or carriers and any class of its or their employes, of a system, group, or regional board or boards of adjustment, for the purpose of adjusting and deciding disputes of the same character as those which may under other provisions of the Act be submitted to the National Board. Where such a system board of adjustment is established by mutual agreement, such board would have authority with respect to and would in fact determine disputes of the same character as those submitted in other cases to the National Board, and the National Board would have no authority with respect to such disputes falling within the terms of the agreement establishing the system board, at least so long as that agreement remained in effect.

Thus, a question involving the interpretation of a particular provision in an agreement and the application of that provision to a particular operating practice may in one case, where the dispute is between the carrier and its employe or employes, be considered and determined by the National Adjustment Board, while in another case, where the dispute is between two employes or groups of employes, as to their respective seniority rights, for example, the same question, involving the same contract provision and the same operating practice, is excluded from consideration by the Board, and is therefore subject

* It was so held in *Stephenson* v. *N. O. & N. E. R. Co.*, 180 Miss. 147, 166-67, 177 So. 509, 514 (1937); *Long* v. *Van Osdale*, 26 N. E. (2d) 69, 73 (1940), affirmed without comment on this point, 218 Ind. 483, 29 N. E. (2d) 953 (1940); cf. *Malone* v. *Gardner*, 62 F. (2d) 15, 20 (1932).

only to consideration by a court in the first instance. Or, a question arising on one railroad, which is properly within the authority of a system board established by agreement for that railroad, may be the same as the question involved in a dispute arising on another railroad, which properly falls within the authority of the National Adjustment Board. Obviously, such a statutory scheme does not proceed from the assumption, inherent in the primary jurisdiction doctrine, that the statutory tribunal must be given exclusive authority to determine in the first instance all questions arising within the supposedly technical field in which it is claimed to be specially trained, since in some cases questions within that field may properly be considered by the National Board while in other cases questions of the same type, involving the same supposedly technical fact issues, would be excluded from the National Board's consideration and would therefore admit of no alternative except that of consideration by the courts in the first instance or by system boards of adjustment.

It follows from these considerations that the National Railroad Adjustment Board is unlike the Interstate Commerce Commission, in that the Adjustment Board is not an administrative or regulatory or quasi-judicial tribunal and is not intended by Congress to be charged with the maintenance of a statutory standard, the uniform application of which would be impaired by the exercise of jurisdiction by the courts without prior resort to the tribunal. Accordingly, the primary jurisdiction doctrine should be held to have no application with respect to the National Railroad Adjustment Board.

The fundamental difference between the National Railroad Adjustment Board, on the one hand, and an administrative tribunal charged with the maintenance of statutory standards in the regulation of a particular field of activity, such as the Interstate Commerce Commission, on the other hand, has been very recently recognized by

this Court. In *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, No. 218, October Term, 1942, this Court held unanimously, in an opinion by Mr. Justice Jackson handed down January 18, 1943, that the National Railroad Adjustment Board was not vested by the Railway Labor Act with regulatory authority within the field of wages, hours, and working conditions in the railroad industry, so as to exclude regulatory action by a state commission within that field. The question was whether an order of the Illinois Commerce Commission, requiring the carrier to provide caboose cars on certain of its trains in the interest of the health, safety, and comfort of the trainmen, constituted an invasion of a field assigned by the National Railway Labor Act to the Adjustment Board. It was assumed by this Court that the dispute between the carrier and the trainmen regarding the providing of the caboose cars in question, out of which the order of the Illinois Commission grew, was one which the Adjustment Board would have had authority to consider and determine, as a dispute involving working conditions. Speaking for this Court, Mr. Justice Jackson held that the order of the Illinois Commission did not constitute an invasion of a field exclusively assigned to the Adjustment Board, and said:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. *The national interest expressed by those Acts is not primarily in the working conditions as such.* So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. *The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The*

federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers.

"* * * We hold that the enactment by Congress of the Railway Labor Act was *not a preemption of the field of regulating working conditions themselves* and did not preclude the State of Illinois from making the order in question." (Emphasis supplied.)

Thus, this Court expressly recognized in that case that the function of the National Railroad Adjustment Board is not that of regulation, much less of exclusive regulation, of conditions within a given field, and therefore does not come in conflict with or exclude the exercise of regulatory powers within that field by a tribunal whose function does embrace such regulation. Even though the Adjustment Board may have authority to determine a question which arises within a field previously committed to another tribunal, such as a state regulatory commission, which is charged with regulation and with the maintenance of statutory standards within that field, there is no conflict of jurisdiction or occupation of the field by the Adjustment Board, because the latter Board is charged with an entirely different function, namely, that of composing differences between employer and employes and arranging "adjustments" so as to prevent, if possible, disagreements between carriers and their employes from interfering with interstate commerce. On the one hand, the Illinois Commerce Commission is charged with the maintenance of a certain standard of conditions, for the purpose of maintaining the health and safety of workers. On the other hand, the Adjustment Board, in taking cognizance of a dispute between employer and employes with respect to

working conditions is not charged with the maintenance of any standard as to the health and safety of the employes but is concerned only to "adjust" the dispute between the employer and the employes, so as to prevent that dispute from creating an interference with interstate commerce.

The plain conclusion from this reasoning in the *Terminal Railroad Association* case is that no statutory standard requiring uniformity of application, and therefore exclusiveness of jurisdiction to insure such uniformity, has been committed by the Railway Labor Act to the care of the Adjustment Board. Whether the dispute which comes before the Board is one involving rates of pay, working conditions, seniority in assignment to jobs, or other matters in controversy between employer and employes, within the purview of the Railway Labor Act, the Adjustment Board is not charged by the statute with the duty of maintaining any level of pay, any standard of working conditions, or any other standard. Its statutory objective is confined to the "adjustment" of disputes, and to suggesting for possible agreement whatever course of action may be necessary to bring about such adjustment, whether the rates of pay be raised or lowered or working conditions be improved or not. As stated by Mr. Justice Jackson, the national interest expressed by the Act "is not primarily in the working conditions as such," which conditions, so far as the Act is concerned, "may be as bad as the employees will tolerate or be made as good as they can bargain for."

Since Congress did not commit to the Adjustment Board any statutory standard requiring uniformity of application, there is no basis for presuming that Congress intended to vest the Board with an exclusiveness of jurisdiction of the kind which under the primary jurisdiction doctrine is thought to be necessary to insure uniformity in the maintenance of a statutory standard. As this Court expressly held in the *Terminal Railroad Association* case,

"The enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves," and therefore action by a state commission exercising administrative powers to regulate conditions within that field was not excluded. For the same reason, exercise by state courts of judicial powers to regulate and adjudicate relations between citizens of the state growing out of a contract between them should not be excluded—as it would be if the *Moore* case is overruled or if petitioner is not permitted to maintain this suit—by the fact that a dispute submitted to the state courts for such adjudication is one which might have been or has in fact been submitted to the National Railroad Adjustment Board.

(b) *The Decisions of the Adjustment Board Do not Proceed from the Informed Judgments of a Continuing Body of Experts.*

Recurring to the language of Mr. Chief Justice Hughes, quoted above, in the opinion of this Court in *Board of Railway Commissioners v. Great Northern Ry., supra,* the primary jurisdiction doctrine stemming from the *Abilene* decision applies to "an expert body continuously employed in administrative supervision." The Adjustment Board, as stated in the preceding section, is not a body employed, continuously or otherwise, in administrative supervision of any kind; nor is it in any sense an expert body. It has none of the characteristics bringing it within the operation of the principle that when an expert administrative body exists it should have primary jurisdiction over "technical and intricate matters of fact," demanding "the exercise of sound administrative discretion." That the Adjustment Board is not an expert body of this character falling within the category of such Federal agencies as the Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, and similar administrative agencies, is shown by the nature of the Adjustment Board, its composition, the method of appointment and com-

pensation of its members, and its method of operation. The members of the Board themselves are neither impartial nor expert, nor are they in any proper sense representatives of the government, since they are selected and compensated not by the government but by the parties whose disputes they are called on to decide.

The National Railroad Adjustment Board consists of four divisions or groups, each of which is composed of an equal number of partisan representatives of the employers and of the employes' organizations. Each division is authorized by the Act (Sec. 3 First (h)) to hear disputes involving specified classifications of employes. The Act itself shows that the Board is not, and is not intended by Congress to be, a body of public administrative officials appointed by governmental authority and compensated from the public treasury. The Act provides (Sec. 3 First (a)) that the Board shall consist of members, half of whom are selected by the carriers and half by such organizations of employes, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of the Act. It is further provided (Sec. 3 First (g)) that "Each member of the Adjustment Board shall be compensated by the party or parties he is to represent."* In this respect the Board is, of course, a body of an altogether different type from a tribunal like the Interstate Commerce Commission, whose members are appointed by the President for fixed terms and are paid from the United States Treasury. Obviously, members of the Adjustment Board who are selected and paid by one of the parties to a dispute pending before the Board, and whose tenure may be

*The Act does provide that, where a referee is called in for the purpose of breaking a deadlock among the members of the Board, such referee shall be paid by the Mediation Board, which is a governmental agency (Sec. 3 First (g)). However, it will be pointed out below (pages 53-57) that a referee who is thus called in for particular cases is not a regular member of the Adjustment Board and is in no sense a specially trained administrator of the specialized character found in the case of a member of the Interstate Commerce Commission, for example.

terminated by such party at any time, cannot be considered to be expert public administrative officials of the impartial and specialized character found in the case of members of the Interstate Commerce Commission and other like public administrative agencies. The very phrase "to represent," used in the language just quoted from Section 3 First (g), in itself shows a Congressional view that members of the Adjustment Board do not sit in a judicial or quasi-judicial or administrative capacity, as representatives of the government charged with the duty of protecting the public interest, but instead function as partisan *representatives* of the party or parties by whom they are selected and compensated and whose disputes they are called on to decide.

The Board has been described as follows (Compilation,* p. 83):

> "Of the Board's thirty-six members, eighteen are in the employ of carriers and eighteen are employees of labor organizations. *Board members are selected and paid by their respective principals, not by the government.* Members on both sides serve only at the will of their respective principals, and although some members are reluctant to acknowledge it, *the principals' wishes usually seem to take precedence over all other considerations in determining the Board's policies.* The Board is thus bipartisan in fact as well as in theory." (Emphasis supplied.)

* This and other references designated "Compilation" refer to the volume entitled "Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board," issued by Harry E. Jones, "Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, 5710 Grand Central Terminal, New York City," which includes a reprint of documents and stenographic minutes prepared in the course of the investigation of the National Railroad Adjustment Board by the Attorney General's Committee on Administrative Procedure in 1940. This "Compilation" was issued in the same year, immediately after the conclusion of that investigation, and copies were filed with this Court at the time of the previous argument, as embodying an informative mass of material collected in the course of a governmental investigation.

The bipartisan character of the Adjustment Board runs through and colors the entire activity of the Board and its Divisions. Because of the fact that the Board consists of an equal number of members representing the employers and the employes, respectively, the Board has frequently found it extremely difficult, if not impossible, to come to agreement even with respect to comparatively simple questions regarding its own procedure, since either side is able to block the adoption of a rule. A dispute has recently arisen upon which an opinion of the Attorney General has been rendered as to whether or not, under the Act, it is possible to call in a referee to break a deadlock on the adoption of rules of procedure. The Attorney General ruled that it was not. (See Opinion of Attorney General in letter addressed to the President on August 4, 1942.)

The carrier members of the Adjustment Board have commented on this situation in the following words (Compilation, p. 222):

> "The Board as a whole has adopted a skeleton of rules, but insufficient, in the opinion of the carrier members, to bring about that functioning of the Board contemplated by the Act. Supplementary rules have been adopted by some of the Divisions that have improved the procedure before those Divisions; however, the labor members of the First Division (to which Division about 80 per cent of all disputes reaching the Board are referred, and in which the greatest congestion of docket now exists) have consistently declined to adopt the additional supplementary rules that are essential for the proper functioning of that Division. Efforts of the carrier members to secure adoption of uniform rules for all Divisions have been futile.
>
> "* * * The situation on the First Division is convincing evidence that the present practices and rules

of procedure are totally inadequate and in fact, as now applied, are in violation to some extent of the provisions of the Act. Although the law makes provision for breaking a deadlock on disputes referred to the Board, it makes no provision for breaking a deadlock of the Board on the adoption or enforcement of its own rules. As a consequence, carrier members subscribed to such rules as now exist with the full expectation that necessary modifications and amplifications of the rules would later be effected and merely in order to start the Board in operation, not because they considered them adequate or proper to insure that functioning of the Board contemplated by the Act."

The attitude out of which this situation has arisen has been described by a representative of the Attorney General's Committee on Administrative Procedure as follows (Compilation, pp. 86-87):

"Indispensable to even a superficial understanding of the Board's functions is a taste of the general atmosphere in which it carries on its work. *All is not serene and peaceful as in most theoretically nonpartisan government agencies, but the bipartison character of the agency makes itself felt even in the personal relations of the Board members among themselves.* It seems to be a fact that about once every two weeks tempers in Division I become so inflamed that one Board member challenges a Board member of the other side to a fight. A referee relates that he once invited a member from each side, separately, to lunch with him. Each invitation was at first accepted, but when each member learned that the other member was to be present, both members definitely declined. It is said that never yet have a labor member and a carrier member of Division I lunched

together, although they sit at the same hearings day in and day out and work in adjoining offices. Members of Division I on both sides have not hesitated to express in strong language to an outsider their firm conviction that members of the other side are 'dishonest,' 'unfair,' and 'indecent,' and the language is not always limited to such printable terms. The charge is earnestly made by some labor members that the carrier representatives are deliberately attempting to obstruct the Board's business for the purpose of carrying out a carefully formulated design to destroy the Board, and carrier members charge the labor representatives with bad faith in asserting unreasonable claims.

"This spirit of intense antagonism and bitterness is not always kept within the bounds of personal relations among the Board members themselves. On some occasions it has had its effect upon referees. *It is a well-known fact confirmed by both sides that in at least one instance labor members of the Board heaped such severe personal abuse upon a referee who was thought to be about to decide in favor of carriers that the referee could not endure further unpleasantness and resigned without deciding the cases before him.*" (Emphasis supplied.)

Clearly, this is not the atmosphere of an administrative body of experts employed in determining technical and intricate matters of fact through the exercise of wise and impartial administrative discretion. It is equally clear that the members of the Board themselves are not experts of that character and that they do not maintain the attitude of impartial inquiry and analysis essential to expert determinations. On the contrary, their approach to the problems which they are called upon to decide is illustrated by the following statement of a member of Division I (Compilation, pp. 338-39):

"Now, I want to take up the question of writing an opinion with the decisions. I wonder why the railroads after forty years—maybe not quite so long; it has not been that long—but I wonder why they want a lengthy opinion.

"* * * Now all of a sudden they want a long opinion from the First Division. And with the labor members tough * * * we are tough when we try to get what is right for the men, but we are friendly when we walk out of the Board. But we labor members have found this, that the carrier members then existing, one or two of them that came from the Third Division to our Division, on carrying into effect that policy, evidently convinced all carriers that that is a good way to delay arriving at decisions of cases—and the railroads don't want these cases decided, because we are over 3,000 behind now, and they think, like a lawyer who has a bad case, that maybe something will happen and they won't have to pay. I say that. I make that charge. * * *

"But finally—finally this mess of trying to prepare some rules of procedure. For what? We don't need rules of procedure. What we need is a little cooperation from the railroads, a little help from them, to tell their representatives to cooperate with us, to make this law work, tell them not to be afraid to go into a room with a labor representative and talk about a case. You can't get them in a room by themselves. They must be all together. * * *

"It is not rules of procedure. Rules of procedure will delay you. And the people that started the rules of procedure started them to prevent them from having to face the issue of deciding a case. That is a fact. I know."

In spite of the complaint often made that the Adjustment Board does not function, or does not function rapidly

enough, because of the friction between its bipartisan elements, the published annual reports of the Adjustment Board* and of the National Mediation Board* nevertheless show that the Adjustment Board as a whole, and especially its First Division, has made awards in an extraordinarily large number of cases and often with unusual rapidity. Thus one member of that Division stated that on one occasion the Division "disposed of hearings in 67 cases in one day. * * * Another day we nearly topped that record" (Compilation, pp. 190-91). This record is certainly high, compared with that of a body like the Interstate Commerce Commission, and if there is ground for inference one way or the other, it would appear from the number of cases decided by the Adjustment Board over a given interval that its decisions apparently do not receive such careful study and consideration as do cases decided by the Commission.

Finally, in further support of the petitioner's contention that the decisions of the Adjustment Board do not proceed from the informed judgments of a continuing body of experts, it is to be noted that many of these decisions, and undoubtedly all the most hotly contested ones, are not made by the Adjustment Board itself, but by an outside referee called in *ad hoc* for the decision of a specific lot of cases.

In the instances where decisions of the Adjustment Board are made through referees, the latter are not permanent or continuing officials. Under the present system temporary referees are assigned from time to time to a Division of the Board to decide accumulations of deadlocked cases. These referees are designated by the National Mediation Board from outside lawyers, judges or professors, and are paid on a *per diem* basis—orig-

*The designation of these reports is, "Anual Report of the National Mediation Board, Including the Report of the National Railroad Adjustment Board."

inally $75, now $50, per day.* The published reports of the awards of the First Division of the Adjustment Board show that down to October 31, 1942, 2,875 or approximately 39% of all its decisions,† had been made through referees, and that for this purpose 29 referees had been employed. The reports also show that it is not the practice to employ the same outside referees continuously, but that a particular referee may be called in to decide a batch of cases in a given year and may not be employed thereafter. This is shown by the following tabulation from the Annual Reports of the National Mediation Board, listing the names of referees serving with the First Division of the Adjustment Board, by years, and the number of days of service in each respective year:

1935

Thos. M. Fennell.....March 10-30, April 1-15
Frank M. Swacker.....May 9-31, June 1-8

1936

R. G. Corwin.....101 days
F. P. Douglass..... 41 days
W. E. Morse..... 26 days
W. H. Spencer..... 12 days

1937

Frank P. Douglass..... 60 days
Lloyd K. Garrison..... 31 days
Isaiah L. Scharfman..... 38¼ days
William H. Spencer..... 48 days

* See Compilation, p. 106, and Sixth Annual Report of the National Mediation Board (1940), p. 37.

† The total number of decisions rendered by the First Division of the Adjustment Board up to and including October 31, 1942, was 7,442, according to the published reports of its awards.

1938

John A. Lapp..... 22 days approximately*
Arthur M. Millard..... 58 days*
Isaiah L. Scharfman..... 7 days*
George W. Stocking..... 35 days*
Frank M. Swacker..... 41 days*

1939

Hammond E. Chaffetz... 22 days
John A. Lapp.....136½ days
Frank M. Swacker.....113¾ days

1940

Dexter M. Keezer..... 51¾ days
Richard F. Mitchell..... 15¼ days
Paul W. Richards..... 28½ days
Royal A. Stone..... 10 days
Frank M. Swacker.....280¾ days

1941

Edward F. Carter..... 59 days
Fred L. Fox..... 20 days
Benjamin Hilliard..... 56 days
Thos. F. McAllister..... 3 days
Richard F. Mitchell..... 90 days
Paul W. Richards.....108 days
Robert G. Simmons..... 54 days
St. Clair Smith..... 45½ days
Royal A. Stone..... 23½ days
Frank M. Swacker..... 6¼ days
Jas. H. Wolfe..... 48 days
John C. Young.....121 days

*In the report for 1938 the number of days is not specifically given and can only be approximated by taking the total compensation, which is given, and dividing it by $75. This may not be strictly accurate, as the compensation figure may include items of expenses.

1942

Bruce Blake	26½ days
Leif Erickson	63½ days
Fred L. Fox	22 days
Howard A. Johnson	71¾ days
Thomas J. Mabry	114 days
Richard F. Mitchell	7 days
James B. Riley	68¾ days
Herbert B. Rudolph	64 days
Robert G. Simmons	52 days
St. Clair Smith	3½ days
James H. Wolfe	23 days
John C. Young	22 days

This tabulation shows that, of 29 referees employed on the First Division during the years 1935-42, inclusive, 17 were employed in only one of the yearly periods, 10 were employed in two years, one was employed in three years, and in only one case, that of Frank M. Swacker, was a referee employed in more than three of the eight yearly periods. Moreover, with the single exception of Swacker, none of the referees employed on the First Division in the first five years, from 1935 to 1939, was employed on that Division in any of the last three years, from 1940 to 1942.

Examination of the statistics given in the Annual Reports with reference to the referees employed on all Divisions of the Adjustment Board during the years 1935 to 1942, inclusive, shows that there was a total of forty-seven referees employed on all the Divisions in that period, and that, of that total, twenty-two were employed in only one of the yearly periods, fifteen were employed in only two years, four were employed in three years, and only six were employed in more than three of the eight yearly periods.

Clearly, on the basis of these statistics, the conclusion is inescapable that the referees employed on the various

Divisions of the Adjustment Board cannot in any sense be regarded as continuing experts. Furthermore, these Annual Reports show that practically all the referees have been judges, lawyers, or professors having no special experience or expert competence with respect to the business of operating railroads, or with respect to the terminology of railroad operation (see, for example, the following Annual Reports of the National Mediation Board: Report for 1936, p. 34; Report for 1939, p. 29; Report for 1940, p. 32; Report for 1941, p. 46; Report for 1942, pp. 46-47).

(c) *The Questions "Decided" by the Adjustment Board are not of the Kind to Which the Primary Jurisdiction Doctrine is Applicable Under the Decisions of This Court, Since the Adjustment Board is not in Any Sense a "Fact-finding" Body, and Its Conclusions are not Reached as a Result of Weighing and Considering Evidence.*

In *Gt. No. Ry.* v. *Merchants Elevator Co., supra,* this Court, speaking through Mr. Justice Brandeis, undertook to distinguish the kind of questions which may not be submitted to the courts for determination without prior recourse to the primary jurisdiction of an administrative tribunal like the Interstate Commerce Commission, from the different kind of questions with respect to which preliminary recourse to the administrative tribunal is not required. The distinction is indicated in the following language from the opinion (p. 294 of 259 U. S.):

> *"Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion.* The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. *That operation was solely one of construction; and pre-*

liminary resort to the Commission was, therefore, unnecessary." (Emphasis supplied.)

And again (pp. 291-92 of 259 U. S.):

"• • • what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

"When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. *Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact.* Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established. *But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court*

take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained." (Emphasis supplied.)

In other words, the primary jurisdiction doctrine applies where the question in dispute is of such a character that it necessarily rests upon the determination of some specialized question of fact, and where the procedure of the administrative tribunal is available to determine that question of fact.

Neither of these conditions is present in the case at bar, or in the class of controversies generally with respect to which the National Railroad Adjustment Board is authorized to act. Those controversies are treated by the Adjustment Board as purely and essentially matters of verbal interpretation rather than of fact-finding, and the Adjustment Board is in no sense a fact-finding body, nor is it equipped to make fact-determinations. Indeed, by its rules of procedure the Board has totally incapacitated itself to reach conclusions of fact, because it does not receive evidence, does not permit cross-examination, and, in short, does not employ any of the procedure or make any of the investigations which are prerequisite to trustworthy conclusions of fact.

It is a well-known feature of the procedure of the First Division of the Board that in accordance with its resolution of April 27, 1937, "introduction of evidence at the hearing is foreclosed" (R. 43). At the so-called "hearing" no witnesses are called to testify and no evidence is introduced as to the facts relied on by the parties; contentions are advanced wholly on the basis of *ex parte* allegations which are received by the Division without any opportunity to the parties for cross-examination or other means of testing the truth of the allegations (Complaint, Pars. 22-23; R. 8-9). Finally, the award of the Division contains nothing that in any proper sense can

be described as findings of fact (see so-called "findings" in present case, Complaint, Par. 26; R. 9).

This procedure has been defended on the ground that the Adjustment Board has no proper occasion or need to decide disputed questions of fact. The peculiarity of the procedure was discussed at length during the investigation by the Attorney General's Committee on Administrative Procedure and elicited the following sympathetic explanation from an investigator for that Committee (Compilation, pp. 101-2):

> "*The Board has no power to subpoena witnesses and it simply does not permit testimony of witnesses.* This is true for several reasons. In the first place, *ninety-five per cent of the cases involve no pivotal disputes of fact which cannot easily be resolved.* In the second place, the file of the case which has grown 'on the property' usually exhaustively deals with fact questions and from that file the Board members can usually gain a sufficient understanding of such few factual disputes as arise. Thirdly, witnesses could not conveniently be brought from all parts of the country to Chicago where the hearings are conducted. Fourthly, to permit testimony would probably mean attempting to apply some kind of rules of evidence and to prepare transcripts, and legal talent with all its contributions of complexity and technicality would be drawn into the picture. Fifthly, so long as the Board is bi-partisan in character it probably could not successfully wield the subpoena power. The labor members would no doubt want to subpoena a number of railroad presidents in little cases and to subpoena documents which would satisfy their curiosity about railroad management, but would contribute little to the decision of controversies. The carrier members likewise would tend to require disclosure of union secrets. * * *

"What accounts for the overwhelming opinion in favor of a system of deciding on the basis of hearsay without cross-examination? No doubt the realization that *the real function of the Board is to decide questions of interpretation and application of agreements, instead of mere factual disputes,* is an exceedingly important factor in the thinking of all concerned. *The real issues that count are issues of interpretation and not issues of fact.* Whether or not John Smith has been guilty of some infraction of rules is not very important to either the unions or the railroads, but whether or not the Board should require his reinstatement upon the theory that discharge for one such offense is too severe a penalty is a question which is of consequence to both unions and railroads." (Emphasis supplied.)

In short, from the foregoing summary it seems clear that the Adjustment Board fails to do, and is indeed disabled by its own procedure from doing, the very thing which under the holding of the *Merchants Elevator* case would bring the doctrine of primary jurisdiction into play. The Adjustment Board, for good or bad reasons, is entirely without the power and facilities for making the kind of investigation which is essential to the determination of complicated questions of fact—the sort of fact questions which under the principle of the *Merchants Elevator* case would afford ground for requiring preliminary resort to an administrative body. The Adjustment Board does not undertake to make such determinations, and may in effect be said to be intentionally so organized as to prevent it from making them. The Board confines itself to the interpretation of the agreements in the abstract, without recourse to the factual aids which a court of law would necessarily draw to its assistance. There would, therefore, be no utility whatever in requiring preliminary resort to the Adjustment Board on the doc-

trine of the *Abilene Oil* case, because the Board does not perform, and is incapable of performing, the function which that doctrine singles out for performance by the administrative body.

From all of the above considerations it follows that the primary jurisdiction doctrine has no application with respect to the National Railroad Adjustment Board, since the reasons on which that doctrine is founded do not exist in the case of the Adjustment Board.

C. To Overrule the Moore Case and Hold that Rail Carriers and Their Employes May not Have Access to the Courts Without Preliminary Resort to the Special Statutory Adjustment Procedure of the Railway Labor Act Would Mean in Substance that the 1934 Amendments to the Railway Labor Act Must be Construed as Effecting a Complete and Radical Change in the Character and Legal Effect of the Adjustment Procedure for Handling Railway Labor Disputes, in the Face of an Entire Absence of Anything in the Legislative History of the Act to Show that Congress Intended Such a Result, and Despite the Fact that the Legislative History of the Act Distinctly Shows the Contrary and that Such a Construction Would Lead to Results so Unreasonable and Arbitrary That the Construction Ought not to be Adopted Since not Shown to be Required by the Intent of Congress.

For this Court now to overrule the *Moore* case and hold that neither party to a dispute over which the Adjustment Board has authority may have recourse to the courts before submission of the dispute to the Board would have the effect of holding, as this Court has in effect said, that the adjustment "machinery provided for settling disputes was based on a philosophy of legal compulsion": *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, at p. 635. This Court held otherwise in that case, saying through Mr. Justice Black (pp. 634-6 of 312 U. S.):

"*But we find nothing in that Act which purports* to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or *to make an administrative finding a prerequisite to filing a suit in court.* * * * It is to be noted that the section pointed out, §153 (i), as amended in 1934, provides no more than that disputes '*may* be referred * * * to the * * * Adjustment Board * * *.' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party * * *.' *This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose.* For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, *the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.* The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge." (Emphasis supplied.)

Thus, this Court held in that case that neither the language of the Act nor its legislative history indicated that anything more was intended by Congress than the establishment of a voluntary method of adjustment to which the parties could resort if they chose and which did not displace the ordinary jurisdiction of the courts

to adjudicate the dispute without prior submission to the Board. Reexamination of the Act in the light of its legislative history shows that this Court's conclusion in that respect in the *Moore* case was correct.

1. The Legislative History of the 1934 Amendments to the Railway Labor Act not Merely Shows an Entire Absence of any Congressional Intent to Effectuate Such a Radical Change in the Policy of the Act as Would be Involved in Holding That Under the Act in its Present Form Rail Carriers and Their Employes may not Have Access to the Courts Without Preliminary Resort to the Special Statutory Adjustment Procedure, but in Fact Shows a Contrary Intent on the Part of Congress, viz., an Intent not to Change the Policy of the Act.

The conclusion reached and set forth by this Court in the language above quoted from the opinion in the *Moore* case is fully confirmed by the legislative history of the Adjustment Board provisions of the Railway Labor Act of 1934. The fact that by those provisions Congress effected certain modifications in the permissive procedure already embodied in the Transportation Act of 1920 and the Railway Labor Act of 1926 for the informal adjustment of disputes between carriers and their employes affords no basis whatever for a conclusion that it thereby intended to make judicial procedure for the determination of those disputes unavailable either *ab initio* or otherwise. That the only object of Congress was to make such permissive machinery for informal adjustment more readily available and more useful is clearly stated in the following language from the Report of the Committee of the House of Representatives on Interstate and Foreign Commerce, in recommending for enactment the amendments of 1934 to the Railway Labor Act (House Report No. 1944, 73rd Congress, Second Session, pp. 2-3):

"*The bill does not introduce any new principles into the existing Railway Labor Act,* but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect."

* * * * * * *

"The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives."

* * * * * * *

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between labor unions and the carriers, fixing wages and working conditions. * * * This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes *may* be submitted if they shall not have been adjusted in conference between the parties." (Emphasis supplied.)

Certainly this language neither expresses nor implies any disparagement of the judicial process as applied to railway labor disputes. The most that the language can be made to mean is that the settlement of controversies by compromise or "adjustment" may be desirable, and that facilities should accordingly be provided therefor.

It says nothing, and implies nothing, that would limit the right to a judicial determination of legal issues which the parties are unable or unwilling to settle informally. The two processes, of informal adjustment on the one hand and legal determination on the other hand, had already long been recognized as separately and alternatively available at the time when the 1934 amendments to the then existing Railway Labor Act were adopted. Adjustment boards in one form or another had been a feature of labor relations in the railroad industry since the last war. Between 1920 and 1926 functions of this character had been vested in the so-called Railway Labor Board established under Title III of the Transportation Act of 1920. Speaking of these functions and of their essentially different character from the judicial determination of a controversy, this Court expressed itself as follows in *Penna. R. R.* v. *Labor Board*, 261 U. S. 72, 43 S. Ct. 278 (1923), at p. 84:

> "Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employes, or to enforce or protect them. *Courts can do that.* The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in running the railroad. *It was to reach a fair compromise between the parties, without regard to the legal rights upon which each side might insist in a court of law.*" (Emphasis supplied.)

In the language just quoted this Court recognized and emphasized that there is a useful and important function to be performed in facilitating voluntary compromises and settlements between employes and employers, but that this is a different function from the adjudication and protection of legal rights. As the quoted passage points out, the protection of legal rights is the function of courts and not of the agency of adjustment. The fact that an agency of adjustment is established cannot, therefore, be

construed as indicating any intention on the part of Congress to preclude resort to the courts and thereby prevent the enforcement and protection of legal rights.

There is nothing in the legislative history of the Railway Labor Act of 1934 to indicate that Congress thought it was effecting any revolution in its previous policy. In fact the House Committee in its report specifically stated that "The bill"—*i. e.*, the bill which afterwards became the 1934 Railway Labor Act—"does not introduce any new principles into the existing Railway Labor Act." (House Report No. 1944, 73rd Congress, Second Session, p. 2.) On the contrary, it is clear from the Reports of both the Senate and House Committees* that the provisions of the present Act establishing the National Railroad Adjustment Board were designed simply to correct certain supposed defects in the provisions of the Act of 1926, including defects in the operation of the adjustment machinery. The Act of 1926 contained a provision which purported to require the carriers and their employes to establish an adjustment board or adjustment boards by agreement; but, since alternatives were left open to permit the establishment of separate boards for each carrier or of regional boards or a single national board, the boards which were actually established covered only a portion of the nation's railroad system. Furthermore, the Act provided no effective method of handling cases to a conclusion where the members of a Board disagreed and a deadlock resulted.

It was for the purpose of meeting these supposed defects in the Act of 1926 that the Act of 1934 was enacted, according to the Report of the House Committee. Thus, that report states (House Report No. 1944, 73rd Congress, Second Session, p. 3):

> "The present Railway Labor Act provides for the establishment of boards of adjustment by agreement.

* House Report No. 1944 and Senate Report No. 1065, 73rd Congress, Second Session.

In many instances, however, the carriers and the employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers shall be equally represented on the board.

"* * * the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. * * * This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties. The provisions as to the national board of adjustment are as follows: * * *

"(g) If any division of the Board should deadlock on a dispute, then the representatives on the Board will endeavor to select a neutral or impartial person; and if they are unable to agree upon the selection of such neutral person, then the United States Board of Mediation will appoint a neutral person. The dispute will then be again considered and a majority decision reached."

These were the principal and apparently the only changes which Congress had in mind in substituting the adjustment board provisions of the Act of 1934 for the adjustment board provisions of the Act of 1926. It is significant that there appeared no intention whatever to affect or alter the provisions defining the nature and functions of adjustment boards. The present Act establishes a National Board, since none had been established by agreement under the Act of 1926, but it still permits a carrier and its employes, or a group of carriers and their employes, to establish separate adjustment boards by voluntary agreement (Railway Labor Act of 1934,

Section 3 Second) if they so desire, and where such a separate board is in existence, the National Board has no functions with reference to the disputes which are submitted to the separate board.

The language of the Railway Labor Act of 1934 describing the functions of the National Railroad Adjustment Board (Section 3 First (i)) is borrowed practically verbatim from the language of Section 3 First (c) of the Act of 1926, with the single important difference that, whereas the Act of 1926 provided that, when an adjustment board had been set up by agreement, disputes "shall" be referred to the board, the Act of 1934, in referring to the statutory board, substitutes the permissive word "may." It is clear from the complete parallelism of the pertinent provisions of the present Act and of the Act of 1926 that the functions and status of adjustment boards under the present Act were intended by Congress to be identical with the functions and status of adjustment boards under the 1926 Act, and there is no basis whatever for a suggestion that under either Act there was any intention to substitute adjustment boards for the courts or to require preliminary resort to an adjustment board as a prerequisite of recourse to the courts.

It is clear, therefore, that Congress did not intend by the 1934 amendments to the Railway Labor Act to give to the adjustment procedure for the settlement of railway labor disputes any effect or status different from that which that procedure had previously had, and it is also clear that prior to the 1934 Act the adjustment procedure had not held such a status that preliminary resort thereto was a condition prerequisite to the right to bring a judicial proceeding in the courts. Not merely is there no evidence whatever of an intention on the part of Congress to make any change in this respect in the status of the adjustment procedure, but there is the strongest evidence of an express contrary intent, *i. e.*, an intent not to make any such change, in the statement quoted above from the

House Committee's Report to the effect that "The bill" —*i. e.*, the Railway Labor Act of 1934—"does not introduce any new principles into the existing Railway Labor Act." Accordingly, it seems proved conclusively that to construe the Act of 1934 so as to require that the *Moore* case be overruled would be to fly directly in the face of the legislative history of that Act and to affirm a Congressional intent which that history expressly denies.

2. A Congressional Intent to Require That Rail Carriers and Their Employes May not Have Access to the Courts Without Preliminary Resort to the Special Statutory Adjustment Procedure Ought Not to be Supposed or Implied in the Absence of a Clear Expression of Such Intent, in View of the Fact That Such a Requirement Would Lead to Unreasonable and Arbitrary Results.

Another obstacle to the adoption of a construction of the Act which would require preliminary resort to the adjustment procedure before access to the courts is that it would lead to arbitrary and unreasonable consequences which ought to be avoided in the absence of the clearest kind of showing that they are required by the intent of Congress. The consequences would be arbitrary and unreasonable, because they would amount to ousting the procedure of the courts in favor of a procedure which is not merely as far removed as possible from anything that can be called judicial in character, but which is not in any sense quasi-judicial or even administrative. Some of the peculiarities of that procedure have already been referred to above. Others are equally striking.

(*a*) The first of these is that in the procedure before the Adjustment Board the carrier is required to answer the claim of the employe or employes without seeing the "submission"—*i. e.*, the statement of the claimant's position as presented to the Board—and thus without having

notice of the specific nature and basis of the claim as presented. This practice has been discussed as follows by a representative of the Attorney General's Committee on Administrative Procedure (Compilation, pp. 97-98):

"After the notice [of the claim] is given to the carrier, the parties have thirty days to make their submissions, and normally the submissions will come in from both sides about simultaneously near the end of the thirty-day period. *A submission of a carrier is not in the nature of an answer because it is made without knowledge of the consent of the union's submission.* As a result it sometimes happens that the carrier's submission deals with some aspects of the controversy not raised in the union's submission or that it otherwise misses somewhat the particular contention advanced by the union. *With simultaneous statements from both sides, therefore, the issues are not always clearly demarcated.* Of course, the carrier is not taken by surprise because the statute requires that before a case may be submitted to the Board, the parties must have negotiated and attempted on the property of the carrier to settle or adjust the dispute, and all cases which come to the Board have wound their way up through the hierarchy of union and railroad officials. By the time the case reaches the Board enough negotiation has been carried on that parties on both sides understand the contentions of the other side. *Despite this fact, however, it is still possible by changes in emphasis or by elimination of some contentions to alter somewhat the nature of the claim and it may be reasonably argued that something would be gained by requiring that the union's submission be made first, so that the carrier's submission could be in answer to the union's admitting, denying, and offering affirmative defenses to the specific allegations made in the union's submission. The labor members of the Board, however, object to*

such a practice on the ground that for the union to make its submission first would give an unfair advantage to the carriers because the union would disclose its case first." (Emphasis supplied.)

The author adds in a footnote (Compilation, p. 98):

> "This position of the labor members may not be wholly consistent with their argument that the carriers are fully informed about all aspects of each case by reason of negotiation on the property."

The author also refers (p. 98) to the fact that "Amendments to submissions are made only with the consent of the opposing party."

(*b*) Reference has already been made to the fact that at the "hearing" before the Adjustment Board Division the introduction of evidence is expressly prohibited. Accordingly, what is called "evidence" is incorporated in the "submissions." These are a medley of argument, citation, allegations and supposedly evidentiary material, such as documents and occasional affidavits. In the words of the commentator referred to above, the submissions "consist of evidence, exhibits, arguments and authorities, as well as mere allegations of fact and prayers for relief" (Compilation, p. 98). The commentator describes the hearing before the Board as follows (Compilation, p. 99):

> "Under the original rules the parties come to the hearing without having had opportunity to examine their opponent's submission. Each division, however, has since agreed to permit its Secretary to supply to each party the submission of the other party. The agreement of Division I to this effect was made June 18, 1935, and by its terms expired January 1, 1936. However, it has from time to time been renewed; the present arrangement terminates July 1, 1940, 'unless extended by majority vote of the full membership of the First Division.'

"Before the time for hearing, each party prepares his rebuttal, which takes the form of what is described in all divisions as 'written oral argument.' These arguments are exchanged by the parties in advance of the hearings in Division I and II, but not in Division III. That the practice of Divisions I and II seems preferable is quite unimportant; the important question is what the opposing factions of each division are willing to agree to.

"*The hearing is little more than a reading contest.* Sometimes it is a very, very long reading contest. The employee's representative first reads his submission, then the carrier's representative reads his submission, then the employee's representative reads his 'written oral argument,' and finally the carrier's representative reads his 'written oral argument.' Occasionally, but not usually, the parties agreed to 'stand on the record' and read orally neither the submissions nor the arguments. *This process of oral reading of what has already been reduced to writing is wholly indefensible. Occasionally, in the course of the reading there may be some interpolation by way of explanation or impromptu remarks, but the extent of this is always negligible.* During the reading the Board members customarily do not interrupt with questions, but reserve any questions that may arise until the reading is finished. Board members on both sides recognize that the oral reading is a waste of time. *They have copies of the submissions and the arguments before them and during the reading nearly every Board member will be reading his own copy (or documents in some other matter) and not listening to the oral presentation. In one instance a whole submission on one side had been read in a different case from that which was before the Board and none of the ten Board members who were purporting to listen noticed the discrepancy.* The only defense suggested

> for the practice is the desire of the parties to make sure that the submissions and arguments come to the attention of the Board members, for it is said that the parties fear that unless the oral reading contests are held, the submissions and arguments may be ignored by some Board members." (Emphasis supplied.)

The author adds in a footnote:

> "Even though Board members do not listen to oral readings, still the practice might be defended on the ground that during the reading contests Board members, having nothing better to do, will themselves read the papers which they might otherwise ignore." (Compilation, p. 100.)

It may be observed that the reason why the "hearings" have become mere reading contests is because of insistence on the part of one element of the Board that nothing shall be placed before the Board which is not contained in the submissions. This principle, applied in a technical spirit, necessarily limits the hearing to a verbatim reading of the submissions.

It has been a subject of intense controversy before the First Division whether the parties should be permitted to read or even file with the Board the "written oral arguments" prepared by each party after seeing the submission of the other, and which are the only documents in the nature of an answer that the Board's practice permits. The rule of the First Division allowing the filing of these "written oral arguments" has expired and has not been renewed because of a deadlock. This was the deadlock which led to the application for an opinion of the Attorney General, already referred to at page 49 above. Since the Attorney General has held that a referee could not be appointed to break a deadlock on a question of adopting rules of procedure, it is

not now permitted in the First Division for either party to file or present anything in the nature of an answer to the contentions and allegations of the opposite party. The case thus stands for decision purely on the original "submission" papers, which, as indicated above, may not be directly responsive to each other.

(*c*) After a case has been "heard" by a Division, the subsequent procedure is described as follows (Compilation, p. 104):

> "The cases are heard in groups. The Board does not follow each case through to a decision, but instead will listen to oral presentations in one case and then immediately listen to oral presentations in the next case. When the division meets in executive session for deliberation and voting, it usually will have a large group of cases before it. Out of each group of cases a number will normally be deadlocked. The deadlock cases are 'held in the cooler' for the ten-day period, during which time the division theoretically attempts to agree upon a referee. In Division II the Board members choose a referee within the ten-day period, but in Divisions I and III they assume that they cannot do so and customarily do not even go through the motions of making the attempt. During this waiting period, as a result of the processes of negotiation and bargaining between the two factions, a portion of the deadlocked cases are normally withdrawn from the group which are finally certified to the Mediation Board."

Division I of the Adjustment Board does not permit the parties to make any appearance or argument before the referee, or even to file briefs for his consideration. "On the questions of briefs in Division III and of both oral arguments and briefs in Division I deadlocks persist, with the carrier members voting in favor of according

the privileges, and labor members voting against. As a result of the deadlocks, the privileges are denied, although in the absence of a majority vote no affirmative ruling to that effect is possible" (Compilation, p. 104). Accordingly, the referee hears the case solely as presented to him by the two factions of the division. "The members of the Board on each side become advocates in behalf of the parties for presenting the cases to the referees" (Compilation, p. 105). The referee also has before him the "submissions" of the two parties and the "written oral arguments" where these are permitted to be filed.* On the basis of these materials and the presentation made to him by the Board members, he decides the case, and occasionally, but very seldom, writes an opinion.

(*d*) Usually the determination of the dispute takes the form of a series of very brief "findings," such as those reproduced at page 42 of the "Compilation" from Award No. 1878 of the First Division. These "findings" and the award based thereon are in the following language:

> "*Findings:* The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:
>
> "The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.
>
> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein.
>
> "The parties to said dispute were given due notice of hearing thereon.

*This is no longer true in Division I, since the expiration, referred to above, of the rule permitting "written oral arguments" in that Division. Accordingly, in cases before that Division the referee now has before him no paper constituting an answer by the employer to employes' original submission.

"Claim is supported by the rules.

"AWARD

"Claim sustained."

Of this character were the findings and award involved in the case at bar and reproduced in the Record (R. 54) as follows:

"*Findings:* The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The work described in this docket is within the jurisdiction of the men holding seniority exclusively on the rails of the Washington Terminal Company.

"AWARD

"Claim sustained."

Obviously, these so-called "findings" are not findings of fact in the normal and usual sense of that term. They are entirely formalistic and disclose nothing as to the Board's detailed views with respect to the specific issues of fact involved in the dispute.

In considering the foregoing procedure, the question may well suggest itself as to what opportunity it really offers for the kind of informal "adjustments" and compromises which, in accordance with the Congressional intent, are the object of the procedure. In fact, the whole procedure seems to be unusually rigid and formalistic, while at the same time affording no proper opportunity

for a presentation and argument of the controversy on the law and the evidence. What at least does seem clear is that the procedure is not in any sense adapted to provide, and does not in any way provide, an opportunity to prove facts, such as the customs and practices prevailing on particular railroad properties and in the light of which the rules and agreements applicable to those properties should properly be interpreted. Certainly such procedure does not afford anything that could properly be regarded as a substitute for a judicial or quasi-judicial hearing, or which could lay the foundation for a legal determination of the rights of the parties.

Since the adjustment procedure thus provides no means appropriate for a determination of the legal rights of the parties and, as shown above, was not intended by Congress to provide means for .that purpose, it would be plainly unreasonable and arbitrary to hold, in the absence of the clearest expression of Congressional intent, that the parties should be precluded from a determination of their legal rights before seeking and obtaining an award which is thus not designed and adapted to prepare for or establish a determination of those legal rights but is aimed at another objective. Here again there is the sharpest kind of distinction between the adjustment procedure, on the one hand, and the procedure of the Interstate Commerce Commission to which the primary jurisdiction doctrine is applicable, on the other hand. In the case of the Interstate Commerce Commission the procedure of that body, to which resort must be had before access is available to the courts under the primary jurisdiction doctrine, is in every sense quasi-judicial procedure and is directed as fully as is the procedure of the courts toward determining the parties' legal rights. Thus the Commission's determination once made becomes available as a stage in the ultimate judicial determination of the controversy. Obviously this is not true in the case of a

determination made by the Adjustment Board, which is neither judicial nor quasi-judicial, and is aimed not at clarifying or determining the parties' legal rights but at another and different purpose. To hold that the parties, as a condition of obtaining determination of their legal rights, must first resort to such a non-judicial procedure, which is avowedly not designed to result in a determination of their rights, would be a result so unusual and unreasonable that clearly it should not be adopted in the absence of an unmistakable Congressional expression of intention. That the Congressional intention is to the opposite effect is shown by the legislative history of the Act, reviewed above (pp. 64-70).

D. The Question Whether or not the Moore Case Should be Overruled is not Directly Involved in the Case at Bar, Which Concerns the Employer's Right of Access to the Courts After the Adjustment Procedure Has Been Invoked and Pursued to a Conclusion by the Employe; But, If the Moore Case was Rightly Decided and If Its Reasoning is Correct, Then, Since the Adjustment Procedure is One Through Which the Parties Do not and Cannot Obtain a Judicial Determination of Their Contract Rights, Either Party Must Be Entitled to Such a Determination in the Courts After the Adjustment Procedure Has Been Pursued by the Other Party.

The foregoing discussion has been in response to the first part of the first question propounded by this Court, and has been addressed to the question whether or not a party to a dispute of the kind over which the National Railroad Adjustment Board has authority may invoke the jurisdiction of the judicial courts with respect to such dispute *before* resorting, in the first instance, to the Adjustment Board. The *Moore* case decided that question in the affirmative, and it has been the purpose of the present

section of this brief to show that the *Moore* case was rightly decided.

However, the point decided by the *Moore* case does not of course dispose of the issue presented in the case at bar—it merely contributes a preliminary step in the reasoning pertinent to a determination of the question which the Court is here called upon to decide. In the case at bar this Court is called upon to decide whether or not an employer has a right of access to the courts for the judicial determination of its contract rights with its employes *after* the adjustment procedure has been invoked and pursued to a conclusion before the Adjustment Board by the employes.

What bearing on this latter question is given by the answer to the problem presented in the *Moore* case? In other words, assuming that the *Moore* case was correctly decided and that, before submission of a dispute to the Adjustment Board, either party may invoke the jurisdiction of a court, what follows from that conclusion with respect to the right of access to the courts by one party after the other has chosen to pursue the adjustment procedure, and has pursued that procedure to a conclusion, before the Adjustment Board?

It will be the purpose of the following sections of this brief to contend, on a number of grounds which will hereafter be developed, that, because of the nature and functions of the adjustment procedure, where an employe has invoked that procedure and has obtained a so-called award from the Adjustment Board, the employer is not thereby barred from resort to the courts. Petitioner submits that one of the grounds supporting and confirming this conclusion is supplied by this Court's decision in the *Moore* case and by the theory and conception of the adjustment procedure on which that decision is founded. For if the *Moore* case was rightly decided, two consequences follow. One is that the statutory adjustment procedure of the Railway Labor Act is not in any sense a compulsory or

an exclusive procedure. The second is that, as pointed out by this Court in its opinion in that case, the adjustment procedure is not a method of determining the party's legal rights, but is merely a "system of peaceful adjustment and mediation."

Both these consequences require the conclusion that the unilateral act of one party in setting the adjustment procedure in motion should not operate to bar access by the other party to the courts. Clearly, the fact that one party to a contract, namely the employe, chooses to resort to a procedure which by its nature is not designed or adapted to determine the legal rights of the parties should not be held to have the effect of thereby barring the other party from recourse to a court, which is the only tribunal where such a determination of its legal rights can be obtained. In view of the nature of the adjustment procedure, as fully recognized in the *Moore* case, it follows that if one of the parties, by resorting to that procedure, can in effect make it exclusive as against the other, so as thereafter to bar that other from the courts, then the former will in effect be able to deprive the latter of an opportunity for a judicial determination of its rights. Accordingly, the decision of this Court in the *Moore* case and the philosophy upon which that decision is founded require that the question whether the employer has a right of access to the courts after the adjustment procedure has been invoked by the employe, must be answered in the affirmative.

This follows *a fortiori* from the fact that, in view of the way in which the adjustment procedure is set up and operates, the issuance of an award by the Board can be brought about by the purely unilateral action of one party to the contract, as will be shown in the following section.

SECTION II.

(Answer to the Court's Second Question.)

UNDER THE RAILWAY LABOR ACT THE ADJUSTMENT BOARD MAY AND IN FACT DOES MAKE AN AWARD EX PARTE IF ONE PARTY TO THE DISPUTE DOES NOT APPEAR BEFORE THE BOARD, AND SUCH AWARD IS GIVEN THE SAME EFFECT AS AN AWARD MADE BY THE BOARD AFTER BOTH PARTIES HAVE APPEARED.

The second question put by this Court in its order of November 16, 1942, is as follows:

> "2. Whether the Board may make an award ex parte if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award."

Before proceeding to answer this question it will be appropriate to discuss its significance and bearing on the central issue involved in the case at bar, viz., whether or not, after the employes have invoked the adjustment procedure, the employer is barred from access to the courts.

A. Significance of the Court's Second Question.

The second question propounded by the Court and reproduced above is relevant to the petitioner's argument in the following way:

Assuming that the *Moore* case was rightly decided, the contention might conceivably be advanced that, even though the parties have access to the courts before there has been resort to the adjustment procedure, nevertheless their right to such access ceases when the adjustment procedure has once been invoked. Of course the answer to this contention is the one made at the close of the previous section of this brief, namely, that such a

contention would mean that the employe by invoking the adjustment procedure could by his unilateral act bar the employer from a judicial determination of its rights—a result clearly unreasonable and arbitrary. This answer, however, raises the question whether it is in fact true that the adjustment procedure can be set in motion and pursued to a conclusion by the unilateral act of the employe and without the consent and participation of both parties. If not, and if the participation of the employer is essential to the making of an award by the Adjustment Board, then there might be ground for contending that, if such an award does operate to bar the employer from access to the courts, the employer has no cause of complaint since it might be said that by having participated in the proceedings before the Board the employer has voluntarily forfeited its right to resort subsequently to the courts.* On the other hand, if the Adjustment Board is authorized to and does make awards in cases where one of the parties does not participate and does not appear before the Board, then it may not be said that the employer by appearing before the Board and participating in its proceedings has in any sense voluntarily chosen the adjustment procedure of the Board for the determination of the dispute or has voluntarily forfeited its right to resort subsequently to the courts.

Accordingly, it becomes relevant to inquire whether the Adjustment Board may make an award if one party to the dispute does not appear before it, and if so what is the legal effect of such an award.

B. The Adjustment Board Has and Exercises Authority to Determine and Issue Awards in Disputes Submitted to It by One Party Without the Appearance of the Other Party, and Such Awards are Given the Same Effect as Other Awards of the Board.

The second question put by this Court presents two possibilities: either (1) the Adjustment Board is without

*However, it is not believed that such a contention would be sound (see discussion at pp. 188-91 below).

authority to make an award *ex parte* where only one of the parties to the dispute appears before it, and any such award issued by it is without the force or effect which the statute gives to an award; or (2) the Board has such authority and may, upon submission of the dispute to it by one of the parties without the appearance of the other party, issue an award which has full force and effect, to the same extent as an award issued by it where both parties have appeared. Examination of the language of the Railway Labor Act and of the actual practices of the Board thereunder shows that it is the second of these two possibilities which is in accordance with the facts and the law and which the carriers must accept, at least in the absence of an authoritative judicial pronouncement to the contrary.

1. The Language of the Railway Labor Act Supports the View That the Adjustment Board has Authority to Determine and Issue Awards in Disputes Submitted to it by One Party Without the Appearance of the Other Party.

Let the first of the two possibilities presented by the Court's second question be considered. The only portion of the Railway Labor Act which bears in any way on the question whether or not the Adjustment Board may make an award on the submission of one party alone is contained in Section 3 First (i) of the Act. It will be recalled that that section provides that disputes "may be referred by petition of the parties *or by either party* to the appropriate division of the Adjustment Board." Thus, the Act specifically says that a dispute may be referred to the Board by petition of either party. What sense or significance would this language have, if the Board were without authority to consider and decide a dispute so submitted by one party and if an award made by it with respect to such a dispute were without force or effect? If such a conclusion were reached, then the provision that a dispute could be submitted by *either* party would have

no significance because a dispute so submitted would be one which the Board could do nothing about.

On the contrary, if any meaning and import is to be given to the language providing for submission of a dispute by either party, then it must be construed as authorizing the Adjustment Board to take cognizance of a dispute so submitted by one of the parties and to proceed, as a court would, to consider the merits and render an award, whether or not the other party appears after having been given due notice and opportunity to do so. In an ordinary legal proceeding a plaintiff may submit a controversy to a court and the court, assuming that it has jurisdiction of the subject matter and of the person of the defendant, will, upon proof of proper service on the defendant and opportunity given him to appear, proceed to consider and determine the controversy, even though the defendant may not in fact appear. In the same way, the sense of the provisions of Section 3 First (i) of the Railway Labor Act seems clearly to be that the Adjustment Board may proceed in like manner and may consider and determine a dispute submitted to it by one of the parties alone, even though the other party, although notified* and given an opportunity to appear in accordance with the Board's rules, fails to do so. Of course it is the carriers' view that the Board's rules do not give them adequate notice and opportunity to appear and defend themselves against claims submitted to the Board by employes. However, this is a question of the adequacy of the Board's rules which has not yet been passed upon with any finality by the courts, and so long as those rules stand the carriers are obviously obliged as a practical matter to abide by them or incur the risk of having awards entered against them for lack of a defense.

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*Where a party affected by an award of the Adjustment Board has been given no notice of the Board's proceedings, it has been held that the Board's award is invalid as to him: *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A 7th, 1936), cert. den. 300 U. S. 673, 57 S. Ct. 612.

Thus it is clear, from the language of the Act permitting the submission of a dispute to the Adjustment Board "by either party," that the Act contemplates that the Adjustment Board should take cognizance of a dispute so submitted by one of the parties and render an award with respect thereto, even though the other party should fail to appear.

For the same reasons, it is clear that such an award rendered by the Board with respect to a dispute submitted to it *ex parte,* without the appearance of the other party, is given by the statute the same force and effect as an award rendered after the appearance of both parties. As pointed out above, the language of Sec. 3 First (i) of the Act to the effect that disputes may be referred to the Board by petition of either party would have no sense or significance if it were held that the Board is without authority to consider and determine such disputes. That language of the Act would be equally without sense or significance if it were held that, although the Board could take cognizance of a dispute so submitted by either party and could enter an award with respect thereto, such award would be without force or effect. No distinction is made by the Railway Labor Act, or even suggested by any of its provisions, between the effect of a default award rendered by the Board against a carrier, for example, in the absence of its appearance, and an award entered against a carrier where both parties have appeared. Nothing in the statute suggests, and there is no reason to look for, any middle ground between the proposition, on the one hand, that an award issued by the Board with respect to a dispute submitted by one party without the appearance of the other is without force or effect, and, on the other hand, the proposition that such an award has the same force and effect as an award entered after the appearance of both parties. Since the first of these two propositions is plainly contrary to the language of the Act in that it would render such language

without meaning or significance, it follows that the second proposition must be accepted, and it must therefore be concluded that an award entered by the Board upon the submission of the dispute by one party without the appearance of the other is given by the statute the same force and effect as an award entered after the appearance of both parties.

2. The Practice of the Adjustment Board is to Take Cognizance of a Dispute Submitted to it by One Party Without the Appearance of the Other Party and to Enter a Default Award Against the Non-Appearing Party in Such a Case.

As a matter of fact, the Board has consistently followed the practice of entering default awards, with apparent disregard of the merits, against carriers who fail to appear to defend themselves against a unilateral submission of a dispute by an employe or employes. This is demonstrated by the Board's own published reports of its awards. Examination of those reports shows that, in cases where there is a submission by both parties, the report contains a section entitled "Employees' Statement of Facts," followed in turn by a statement of the carrier's "position." Where, however, the carrier does not appear before the Board, the Board's report contains only the "Employees' Statement of Facts" and the statement of the employes' "position," and does not contain any section entitled "Carrier's Statement of Facts" or statement of the carrier's "position," and the section of the Board's report entitled "Findings" contains a statement to the effect that the carrier, although notified, made no answer to the *ex parte* submission and was not represented at the hearing. See, for example, the awards reported at pages 318-70, inclusive, of Vol. XII, "Awards 2066 to 2200, First Division, National Railroad Adjustment Board" (Government Printing Office). In the case of each of those reports, the section entitled "Findings" contains the following language:

"*Findings.*—The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that: * * *

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The respondent carrier herein has not made answer to petitioner's ex parte submission in accordance with the rules of procedure adopted by the Division, or within a period of time, with extensions granted, which period of time the Division finds to have been reasonable, and was not represented at the hearing and did not introduce any evidence.

"This award is, therefore, necessarily based upon the facts and evidence submitted by petitioner and the agreement governing wages and working conditions found to exist between the parties."

It will be further noted from these reports that the Board enters exactly the same sort of award, in favor of the employes, in cases in which the carriers do not appear as it does in cases in which the carriers do appear. Thus the well established practice of the Adjustment Board is to enter default awards against carriers who fail to appear in response to *ex parte* submissions by the employes.

The result of this practice on the part of the Board has of course been to compel carriers to appear before the Board in response to a unilateral submission of a dispute by an employe or employes, even in cases where the carrier does not believe it proper for the Board to entertain jurisdiction of the dispute, and despite the carrier's view that the Board's rules of procedure do not give it adequate notice and opportunity to be heard. Unless a proceeding like the present one is permitted to go forward on the merits, there has been and will be no way for a

carrier to obtain a judicial determination of the question whether or not the Board has authority over the dispute when a carrier fails to appear before it, or of the question whether or not the Board's rules provide adequate notice and opportunity to be heard, or of any other question concerning the validity and propriety of any of the Board's awards. The reason for this inability to obtain a judicial determination of such questions is that the Railway Labor Act makes no express provision of a method for the carrier to proceed on its own initiative to obtain such a judicial determination after an award has been made, and the employes in fact never exercise the opportunity given them by Section 3 First (p) of the Act to bring these disputes into court after they have obtained favorable awards from the Adjustment Board, since they are ordinarily able to obtain compliance by other, and to them more effective, methods (see pages 103-23 below). Therefore, unless a judicial determination of the merits of the Board's awards and of the adequacy of its procedure is permitted in such a proceeding as the present one, the carriers will continue to be without an opportunity of having a judicial determination of legal questions affecting their rights and obligations.

3. In View of the Provisions of the Railway Labor Act and the Board's Practice of Entering Default Awards Against Non-appearing Carriers, the Carriers are as a Practical Matter Compelled to Treat those Awards as Having the Same Effect as other Awards, and They Accordingly Find it Necessary to Appear Before the Board and Defend Their Rights Against Unilateral Submissions of Disputes by Employes, with the Result that the Carriers Cannot be Said to be Exercising a Voluntary Choice or Election in Appearing Before the Board.

Since the practice of the Board thus is to enter a default award against a carrier who fails to appear and defend

itself against a unilateral submission of the dispute, and since the carriers have up to the present time been denied any opportunity to obtain judicial consideration and determination of their rights and obligations in matters thus unilaterally submitted to the Board by the employes, it is plain that, when an employe or group of employes chooses to submit a dispute unilaterally to the Board, a carrier has no practical alternative except to appear before the Board and defend itself as best it can against the claim. There are two principal reasons why any other course would be impractical and in fact impossible for a carrier in such a position. In the first place, it would be unwise and wholly neglectful of the carrier's rights for it to refuse to make the best defense that it can before the Board, when it knows that, without such defense, the Board will automatically proceed to enter a default award against it, whereas the presentation of such a defense may—although in most cases it does not—have some persuasive effect on the Board. For a carrier thus to refuse to appear and defend itself on the merits before the Board would be as unwise and as neglectful of the carrier's rights as it would be for a defendant in a Federal court proceeding to refuse to present its case on the merits to the court after a denial of its motion to dismiss for want of diversity of citizenship or other like jurisdictional basis.

In the second place, it would as a practical matter be impossible for the carriers to ignore the Board by refusing to appear before it, because such a refusal would in the public eye amount to ignoring the machinery set up by an important enactment of Congress and disregarding the public policy which that enactment purports to represent. As a practical matter, the carriers could not properly and successfully adopt a policy of ignoring the Adjustment Board and its awards, in cases which are unilaterally submitted to the Board by employes without the concurrence of the carriers. The existence of the adjustment

procedure, its establishment by Congress, its embodiment as an important provision in the Railway Labor Act, and the expectation founded upon it by the carriers' employes, all preclude the possibility of such a course on the part of the carriers, at least in the absence of some authoritative judicial pronouncement to the effect that carriers are not bound to appear in the case of such *ex parte* submissions and that awards made by the Board in default of such appearance are without force or effect.

Of course if this Court should decide that the Adjustment Board is without authority to determine a dispute submitted to it by one party without the appearance of the other party, the dangers to which the carriers would be exposed by refusing to appear in such cases and the reasons of policy against such refusal to appear would no longer be controlling. But, in the absence of such a decision, carriers have no alternative except to appear and defend themselves against such *ex parte* submissions.

Nor do the carriers have any practical alternative except to treat awards entered against them on *ex parte* submissions as having the same force and effect as awards entered against them after the appearance of both parties. As pointed out above, no distinction is made by the Railway Labor Act between the effect of a default award entered on an *ex parte* submission and the effect of an award entered after the appearance of both parties, and certainly no such distinction is made or suggested by the Board's decisions or rules. As a practical matter, awards entered on *ex parte* submissions are treated by the Board and by the employes as having the same force and effect as awards entered after the appearance of both parties, and the carriers could not safely treat such awards on *ex parte* submissions in any other way. Whether an award of the Board against a carrier is made in default of the carrier's appearance or is made after its appearance and presentation of a defense on the merits, the award has the same compelling effect on the carrier, re-

sulting from the economic pressure of the circumstances of the award and from the economic pressure brought to bear by the employes to enforce it (See pages 113-23 below), and in the face of such a prospect a carrier could not, without laying itself open to the charge of neglecting its interests and the interests of its owners, and of defying Congressional policy, sit idly by and refuse to defend itself before the Board.

It follows from what has been said above that the answer to the second question put by the Court in its order of November 16, 1942, must be that the Adjustment Board may under the Act, and in fact does, make an award *ex parte* if one party to the dispute does not appear before the Board, and that such awards are given by the language of the statute and are regarded by the Board and the employes, and cannot safely be otherwise regarded by the carriers, as having the same force and effect as awards of the Board made after appearance by both parties. Until there is an authoritative judicial pronouncement to the contrary, a carrier has no practical alternative, in the case of a unilateral submission of a dispute by the employes, except to appear before the Board and defend itself as best it can.

SECTION III.

(Answer to the Second Part of the Court's First Question.)

NEITHER PARTY TO A DISPUTE OVER WHICH THE ADJUSTMENT BOARD HAS AUTHORITY IS PRECLUDED FROM SEEKING A DETERMINATION OF THE DISPUTE IN THE COURTS AFTER SUBMISSION OF THE DISPUTE TO THE BOARD.

A. Introduction and Summary of Argument.

The preceding sections of this brief have dealt with questions preliminary to the issue now before this Court for decision in the case at bar. That issue, which is raised by the second part of the first question put by this Court in its order for reargument, is as follows:

> "Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts • • • *after* submission of the dispute to the Board."

Petitioner's contention is that, in the absence of express statutory provisions to the contrary, this question must be answered in the negative, for reasons to be developed in the present section of this brief. By way of introduction to the more detailed discussion, those reasons will first be broadly summarized in terms which will relate them to the points already established in earlier sections of this brief.

From what has already been established in preceding sections, it follows that the adjustment procedure of the Railway Labor Act is not an exclusive or compulsory procedure, and furthermore is not a method of adjudicating the parties' legal rights under their contracts but is merely a system of "peaceful adjustment and mediation." It also follows that, in view of the way in

which the adjustment procedure is set up and operates, the issue of an award by the Adjustment Board can be brought about by the purely unilateral action of one party to the contract. This being so, if it should now be held that when the adjustment procedure has been invoked, or after it has been invoked and pursued to a conclusion in an award, the employer is thereafter barred from recourse to the courts, this would mean that the employe by unilateral action has it in his power to deprive the employer of opportunity for judicial relief, and can thus make the adjustment procedure exclusive as against the employer, although that procedure is admittedly not designed or adapted to result in a determination of the employer's legal rights. In other words, one party to the contract would have the power to preclude the other from a judicial determination of its rights by creating a situation where the other party would be limited to an "adjustment" of its rights by a non-judicial body. Petitioner submits that the Railway Labor Act should not be construed to produce such a result where there is nothing in the language of the statute to require it and where, on the contrary, the legislative history of the statute plainly requires an opposite result.

Petitioner's argument as thus summarized follows from an acceptance of this Court's decision in the *Moore* case as correct. *A fortiori,* the same result would follow even more certainly if, for purposes of argument, the view should be taken that the *Moore* case was not rightly decided. For, if the *Moore* case was not rightly decided, neither party would be entitled to resort to the courts or would be able to obtain a judicial determination of its rights until after the adjustment procedure had been invoked and had resulted in an award of the Adjustment Board. If this view should be adopted, then clearly after such an award had been made either party must be held entitled to resort to the courts, since otherwise the party denied such access would be precluded altogether from a

judicial determination of its legal rights and would be placed wholly at the mercy of a body whose decisions do not profess to determine rights and whose nature and procedure are frankly not adapted to that purpose. Such a result ought not to be read into the Railway Labor Act or any other statute by construction unless clearly required by the language, or if not by the language, then by the legislative history of the Act.

The principal arguments in favor of the conclusion that after an award of the Adjustment Board the employer should be denied recourse to the courts may be described as two-fold. There is, first, what may be called the technical argument, and, second, the argument from policy. Each of these will now be summarized.

The technical argument, which is fully developed in the opinion of the majority of the Court of Appeals below, and which appears to have afforded the chief reliance of that Court in reaching its decision, is to the following effect. The adjustment procedure established by the Railway Labor Act must be regarded as consisting, after the preliminary negotiations between the parties, of two subsequent stages.* The first stage is said to be the proceeding before the Adjustment Board itself, leading up to an award by one of the Divisions of that body; the second stage is said to consist of the statutory suit at law under Section 3 First (p) of the Act, which is open only to, and may be brought only by, an employe or employes who have obtained a favorable award from the Board. Since the suit under Section 3 First (p) is thus the second stage of what is essentially a single procedure, of which the proceeding before the Adjustment Board is the first

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*In this connection, the statutory process was described as follows in the majority opinion below (p. 242 of 124 F. (2d); R. 336):

"The entire statutory process has three distinct and primary stages: (1) direct negotiation between the disputants; (2) administrative determination; (3) judicial enforcement. While these are distinct, they are not independent. Each is related to the others as links in a chain or successive steps in a stairway leading to decision."

stage, the consequence is said to follow that, after the adjustment procedure has been initially invoked in a proceeding before the Board, no other form of judicial proceeding is thereafter permissible except a suit by the employe under Section 3 First (p). It is said that the entire procedure in both its stages is a unit and must be followed through, so that when an employe has taken a controversy to the Adjustment Board the employer is thereafter completely deprived of a judicial determination of its rights unless the employe subsequently chooses to avail himself of his right to bring a statutory suit under Section 3 First (p). This argument is based on the contention that in the statutory suit under Section 3 First (p) the employe bringing such a suit is given certain advantages; that he would be deprived of these advantages if a suit could be brought by the employer; and that Congress must therefore be taken to have intended that no other kind of suit, except a suit under 3 First (p), should be brought. The proposition having thus supposedly been established that, after the services of the Adjustment Board have been invoked, judicial redress becomes limited to the procedure through Section 3 First (p) and that procedure becomes exclusive, it is then said that the employer, in so far as it can be treated as a party to the Adjustment Board procedure, must, after participating in the Board's proceedings, be regarded as having thereby waived its rights to any judicial determination other than that available to it at the employe's option through Section 3 First (p).

The argument thus summarized will be answered in detail below; but it seems desirable to point out at once that in the last analysis it rests on the single ground that, unless the judicial remedy through Section 3 First (p) is treated as exclusive, the employe would be deprived of the advantages under that form of remedy which Congress is supposed to have intended him to have. If it is shown, as in fact it will be, that the employe will not be deprived

of those advantages, or of any advantages, by the availability of another judicial remedy to the employer, then the argument in favor of the exclusiveness of the remedy through Section 3 First (p) falls to the ground, and with it falls the whole technical argument against the petitioner's right to maintain this suit. At the same time, if the basis is thus removed from the contention that after the adjustment procedure is invoked the judicial remedy through Section 3 First (p) becomes necessarily exclusive, there is no ground for contending that an employer through becoming a party to the adjustment procedure elects to accept the Section 3 First (p) procedure as its sole judicial remedy.

In addition to what has been called above the "technical" argument against petitioner's right to maintain this suit, there is the broader argument purporting to be based on "policy." This is to the effect that, if, after the adjustment procedure has been set in motion, any other form of judicial remedy were available to the employer than that which may be brought at the option of the employe under Section 3 First (p), the Railway Labor Act would be rendered unworkable and the purposes which Congress allegedly had in mind in enacting that Act would be defeated.

Both the technical argument and the argument from policy, as above outlined, are alike in one respect. Both are based on the contention that, after the procedure before the Adjustment Board has been invoked, the employer's right to judicial relief becomes limited to a statutory suit brought by the employe and solely at the employe's option under Section 3 First (p) of the Act. If this contention is capable of acceptance, it must be on the supposition that the availability of such a remedy adequately protects the employer's rights and that the exclusive character of that remedy does not work undue

hardship and oppression on the employer. Otherwise, on ordinary principles of statutory interpretation, the Railway Labor Act should not be given a construction which would produce such a result.

As a matter of fact, it is easy to show, and will at once be shown in the next sub-division of this brief, that a construction of the statute which would remit the employer to a suit under Section 3 First (p) brought by the employe, as the employer's sole and exclusive opportunity for judicial relief after the employe has invoked the adjustment procedure, would not afford the employer a reasonably satisfactory or adequate opportunity for judicial determination of its rights, would not adequately protect those rights, and would work undue hardship and oppression on the employer by barring it from judicial relief altogether and effectively cornering it in a position where it becomes a helpless victim of pressure and coercion.

After this has been shown, the so-called argument from policy will be discussed and it will be established that a construction which would torture the Railway Labor Act into producing the result just described is not required by any policy that can be implied from the language of the Act or that can be supposed on the basis of any evidence whatever to have been within the purpose or intent of Congress.

Finally, the so-called technical argument, outlined above, will be discussed and the question will be considered whether the oppressive and arbitrary result above described is required in order that employes may not be deprived of the special advantages to which they are entitled if they choose to bring suit under Section 3 First (p). It will be readily demonstrated that they will not be deprived of those advantages if such a suit as the present one may be maintained.

Thus, petitioner's position in answer to the second part of the court's first question may be summarized as follows: First, to hold, as did the majority of the Court of Appeals and as respondents urge, that, after a controversy has been submitted to the Adjustment Board by the employes, the employer is not entitled to a judicial determination of its rights otherwise than in a statutory proceeding brought by the employes under Section 3 First (p) of the Act, would have the result of making it possible for the employes by unilateral action to obtain a favorable award from the Adjustment Board and then, by refraining from bringing suit under Section 3 First (p), to deprive the employer altogether of an opportunity for a judicial determination of its rights under its contract with the employes, while at the same time the employes exert pressure and coercion on the employer in order to compel its compliance with their wishes, as expressed in the award of the Board, regardless of the employer's rights under its contract with the employes. Second, the Railway Labor Act should not be construed so as to produce the arbitrary and oppressive results which would thus follow from denying the employer access to the courts on its own initiative after an award of the Board, because such a construction is not required or supported either by any supposed policy of the Act or by any of the provisions of the Act, including the provisions of Section 3 First (p) which give to the employes certain advantages in suits brought thereunder. Finally, the fact that petitioner appeared and defended itself before the Adjustment Board did not amount to a voluntary choice or election by it of the adjustment procedure so as to bar it thereafter from asserting its right to judicial relief subsequently to the issuance of the Board's award.

B. To Hold that, After a Controversy Has Been Submitted to the Adjustment Board by the Employes, the Employer is not Entitled to a Judicial Determination of Its Rights Under Its Contract With the Employes Otherwise Than in a Statutory Proceeding Brought by the Employes Under Section 3 First (p) of the Act, Would Have the Result of Depriving the Employer Altogether of an Opportunity for a Judicial Determination of Those Rights, and Would Thus Make It Possible for the Employes by Their Unilateral Action to Exclude the Employer from Access to the Courts and At the Same Time Exercise Pressure and Coercion on the Employer to Compel Its Compliance With an Award of the Board in Their Favor, Irrespective of The Employer's Legal Rights.

The decision of the majority below, which construes the Railway Labor Act so as to exclude the employer from access to the courts on its own initiative after submission of the dispute to the Adjustment Board, has the effect of placing the employer in a position where it is cornered and deprived of its only possible means of relief, so that it becomes the helpless victim of pressure and coercion exerted upon it by the employes in order to obtain fulfillment of their wishes, as expressed in the Board's award, irrespective of whether the employer's rights are infringed thereby. This follows from the fact that, under the decision of the majority below, the employes may by unilateral action compel the submission of their dispute with the employer to the Adjustment Board, and may thereafter, by refraining from bringing suit under Section 3 First (p)—which may be brought only at their option—render entirely illusory the theoretical opportunity which that section appears to afford of obtaining a judicial determination of the employer's rights. Having thus secured, entirely by unilateral action and without the employer's consent, a favorable award from the Ad-

justment Board and having at the same time deprived the employer of any opportunity for a judicial determination of the issues involved in the award and the employer's rights with respect thereto, the employes are then free to invoke the authoritative status and quality of the award and the economic pressure which its mere existence exerts, to reinforce the exercise of their own collective economic power for the purpose of obtaining compliance with their wishes as expressed in the award.

In developing this argument in this section of the brief, it will be necessary to dispose of three contentions made by respondents and the majority below in reply to petitioner. These are, first, that Section 3 First (p) provides an adequate opportunity for the employer to obtain a judicial determination of its rights and that the employer has nothing to fear if a proceeding under that section is not brought, since an award of the Board is not legally self-enforcing or enforceable as such; second, that the statutory remedy provided in Section 3 First (p) should be held to be adequate because of the similarity of its language to the language of the reparation-suit provisions of the Interstate Commerce Act and the Packers and Stockyards Act, which, according to respondents, have been held to be an adequate and exclusive remedy for the situations to which they apply; and third, that the employer should not be heard to complain of the denial to it of access to the courts on its own initiative after submission of the dispute to the Adjustment Board, because under the doctrine of the *Moore* case the employer has adequate opportunity to obtain on its own initiative a judicial determination of its rights prior to the submission of a dispute to the Board.

These contentions will be answered in conjunction with the development of petitioner's argument in full, in the following subdivisions of the brief.

1. The Provisions of Section 3 First (p) of the Act Do not Afford the Employer a Reasonable or Adequate Opportunity for a Judicial Determination of its Rights.

The contention that after an award of the Adjustment Board the employer's right to a judicial determination of the controversy is limited to a proceeding brought by the employe under Section 3 First (p) of the Act, and that such a proceeding affords the employer a sufficiently adequate opportunity for access to the courts, at least presupposes that suits will actually be brought by employes under Section 3 First (p). If in fact no such suits are brought, if Section 3 First (p) is never used by the employes, then to tell the employer that its exclusive opportunity for judicial relief is through such a proceeding and that that opportunity is adequate, is a futile, formal and fundamentally disingenuous argument. It is one of those arguments

> "That palter with us in a double sense,
> That keep the word of promise to our ear
> And break it to our hope."

To tell one of the parties to a contract that his only opportunity for a judicial determination of his contract rights must be through a proceeding which can be brought only by his adversary but which in fact that adversary will never bring is to trifle with him. Yet such is in fact the substance of the argument to the effect that the employer must await a proceeding under Section 3 First (p) for its day in court, because it is well established that such proceedings are never brought and never will be brought, and that it is against the settled policy of the labor unions to bring them. For these reasons it is clear that the statutory procedure under Section 3 First (p) does not afford the employer an adequate judicial remedy or any judicial remedy; and this will be shown in the ensuing subdivisions of this brief, after which it will

be demonstrated that there is no merit whatever in respondents' contention that Section 3 First (p) must be construed as excluding other forms of judicial relief for the employer because of similarity in the language of that section to sections of the Interstate Commerce Act and the Packers and Stockyards Act, providing for statutory reparation suits.

(a) *The Possibility of Judicial Relief for the Employer Through a Suit under Section 3 First (p) is not Merely Uncertain for the Reason That Whether or not to Institute Such a Suit Rests Entirely in the Option of the Employes, But is in Fact Completely Illusory and Fictitious Because it is Well Established That as a Result of the Settled Policy of the Labor Unions Suits Under Section 3 First (p) are Never Brought.*

The defectiveness in the opportunity for judicial relief which Section 3 First (p) is supposed to offer to the employer consists not in the fact that the employes have it in their power to determine whether or not suits under that section shall be brought, but in the fact that in reality and experience such suits are never brought, and it is the well-settled and well-understood policy of the labor unions that they are not to be brought. This has been pointed out by Dean Garrison, in an article entitled "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale L. J. 567, in the following language (pp. 591-2 of 46 Yale L. J.; pp. 129-30 of Appendix to Compilation):

> "The Board [*i. e.*, the National Railroad Adjustment Board] has no powers of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance. This the union can do in two ways: first, by petitioning the appropriate United States District Court for an order enforcing the Board's award

> [*i. e.*, by a proceeding under Section 3 First (p)] pursuant to the procedure laid down by the statute; and secondly, by economic pressure. The first course has not been adopted. Out of 1,616 awards handed down by the four Divisions up to July 30, 1936, of which considerably over half must have been in favor of the employees, *not one was taken to court for an enforcement order, and the presumption is either that the carriers willingly complied in all these cases, or that, in some of the cases where the carriers did not at first comply, compliance was brought about by threatened strikes.*
>
> "The net result is that, with one exception, *no judicial review of the Board's capacity, procedure or decisions has been had, and none is likely to be had.*" (Emphasis supplied.)

On the same point a representative of the Attorney General's Committee on Administrative Procedure has reported as follows (Compilation, p. 89):

> "Theoretically, the railroads do not need to comply with an award until an action is brought in court to enforce the award. The theory does not accord with the fact, however, because *in practice the unions are usually sufficiently strong that they can use their economic power to enforce the awards without going to court.* This can be done by permitting a number of unenforced awards to accumulate and then taking or threatening to take a strike vote to compel the carriers to comply with the awards. *Of about 5,000 awards that the Board has made to date, not more than half a dozen enforcement proceedings in court have been brought, and yet the great preponderance of the awards have been complied with.*" (Emphasis supplied.)

Another observer, who has served as a referee for the First Division of the Adjustment Board, comments as follows (William H. Spencer, "The National Railroad Adjustment Board," University of Chicago Press, Chicago, 1938, pp. 55-57; reprinted in Appendix to Compilation, p. 148 ff., and especially pp. 205-7):

> "In spite of the fact that the Railway Labor Act has made it as easy and as economical as possible for an employe or his representative to sue in the federal courts upon awards rendered by the Board—by relieving him of his normal liability for costs, by providing for an attorney's fee, and by making the award *prima facie* evidence of the validity of the claim—*labor organizations have discouraged claimants from utilizing the statutory method of enforcing awards.* They are convinced that in the long run they cannot compete with the superior legal talents and tactics of carriers in formal litigation. *The labor organizations accordingly rely upon their collective strength to secure compliance with the awards granted in their favor.* • • • It was the assumption underlying the amended Act that petitioners would sue on their awards, thus affording the carriers an opportunity to secure judicial review of awards. *Certainly, the sponsors of the legislation did not contemplate that strike votes, the mediation machinery, and emergency boards should be relied upon so strongly as means of securing compliance with awards.* Because of the pressure thus placed upon them, carriers contend that they are for all practical purposes denied the privilege of contesting awards in judicial proceedings." (Emphasis supplied.)

Respondents themselves have admitted that the employes do not rely on Section 3 First (p) proceedings in order to obtain compliance with awards of the Board. Thus, respondents said in their brief in the District Court (R. 103):

"The orders of the Board find their primary sanction in the collective economic bargaining power of the employees."

It is thus well recognized that to all intents and purposes the procedure under Section 3 First (p) is a dead letter, is never set in motion by the only parties who can set it in motion, and is, therefore, purely illusory. Accordingly, any opportunity which that procedure may be alleged to offer to the employer for a judicial determination of its rights is likewise illusory.

(b) *Since Judicial Relief Through a Suit under Section 3 First (p) is Purely Illusory, the Employer, if Denied Access to the Courts Through Any Other Form of Proceeding, is Left in a Position Where the Sole Determination of its Controversy with the Employes Respecting Their Contract Rights is Embodied in an Adjustment Board Award, which is not Merely Arrived at Through Wholly Non-judicial Methods, but Which Furthermore Does not Purport to Adjudicate the Rights of the Parties But Applies Instead What the Board or Its Referees Choose to Regard as a Satisfactory "Adjustment" of the Controversy.*

If the view be accepted that after submission of a dispute to the Adjustment Board the employer has no opportunity for judicial construction of the contract provisions out of which the dispute arose unless the employes bring suit under Section 3 First (p), this means, as pointed out in the preceding paragraphs, that the employer has no such opportunity at all. If this should be held to be the law, the employer would be left in a position where the sole pronouncement purporting to determine the controversy would be the Adjustment Board award, which, as will be pointed out below, necessarily carries with it a certain quality of authoritativeness. Accordingly, it is important to recognize in the present

connection that not merely is an Adjustment Board award arrived at through the wholly non-judicial methods previously described, but that it does not purport to adjudicate the legal rights of the parties and may not even represent an attempt to interpret the contract between them according to their intent. On the contrary, it represents an effort to solve the controversy by arriving at what the Board or its referees choose to consider a satisfactory "adjustment" of the conflicting contentions.

The functions of the Adjustment Board were described as follows by respondents in the courts below (Defendants' Memorandum Brief, p. 21; R. 87):

> *"A judge decides the case before him, while, as its name implies, this Board is intended to adjust matters submitted to it.* 'Compromise' judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created." (Emphasis supplied.)

And again (Defendants' Memorandum Brief, pp. 66-67; R. 132-33):

> "* * * *the jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement.* The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.
>
> *"The function of a court is to render a judgment between parties who are before it as litigants.* Such a judgment has the effect of establishing the parties' present rights. With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary. It is a matter of common knowledge that while the adversary character of the

proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"*In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts.* The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but *the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them* in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption." (Emphasis supplied.)

Substantially the same view was expressed to the Attorney General's Committee in a written statement by labor members of the Adjustment Board in the following language (Compilation, p. 212):

"It is our very definite conclusion based upon the history of the law that *the Adjustment Board never was intended to function as a court of equity, but rather that it should operate as a continuation of the conference room method* employed upon the various properties where men and management 'talk things through', argue the meaning of rules, discuss the application in effect under those rules, and finally attempt to reach an equitable 'adjustment' based upon our practical knowledge of how things are done 'back home'." (Emphasis supplied.)

There has apparently been some difference of opinion among members of the Adjustment Board as to precisely

what their function is (see Compilation, pp. 123-218, 230-31), but it is plain from the decisions of the Board that the difference is principally as to how the "adjustments" are to be arrived at, and whether this is to be through "horse-trading" between Board members or through the imposition by the Board of rigid rules of decision, legalistic in character, which grow out of abstract principles of supposed policy but do not find their origin or basis in the contracts of the parties. Thus the following statement is made in a report to the Attorney General's Committee on Administrative Procedure (Compilation, pp. 230-31):

> "Whether the work of the Board should be denominated 'adjustment,' as the Board's name implies, or whether it is adjudication, is a matter of interpretation on which opinions differ widely. • • • The carrier and labor members differ in their analysis of the work of the divisions. For example, the chief of personnel of a large railway, an officer who has had much experience in the Adjustment Board's affairs, declares: 'In hearing and deciding the cases which come before the Board [the Board members] do not act as negotiators or adjusters. Whatever may have been the intent of the law in setting up an Adjustment Board there has been no trace in the history of the Board of any view on its part that its function is to iron out differences by taking into account the situation and needs of the parties and the practical effect of their respective demands, and on the basis of such consideration making concessions to one party in return for concessions made by it for the good of the industry as a whole. The Board has never taken this view of its functions. Instead it has assumed with the strictest legalistic viewpoint that the loosely drawn and often vague terms of the schedules and agreements which come before it have a rigid technical meaning, and that this meaning is to be discovered

> by a process of purely technical reasoning. The most cursory examination of the nature of the arguments put up to the Board and the grounds of its decisions where these are given, conclusively demonstrates that it regards its function as one of strict legal interpretation rather than compromise and adjustment'."

The only criticism to be made of the language just quoted is with respect to the statement in the last sentence that the Board regards its functions as one of "strict legal interpretation." This is incorrect if it means that the Board interprets and applies the contracts between the parties in accordance with law. A more accurate statement is that contained in the immediately preceding sentence, where it is said that the Board applies its own "rigid technical meaning" to the terms of agreements. This is illustrated, for example, by the award of the Board involved in the case at bar. The Board arrived at that award by the application of two highly abstract and theoretical concepts of its own manufacture—first, the concept of a seniority as carrying with it by presumed implication a monopoly of a department of work, and, second, the artificial distinction between so-called road work and so-called yard work, whereby neither can be performed by employes who perform the other. Thus the award in the case at bar was arrived at neither by the judicial process of attempting to construe the contract according to the intent of the parties, nor by the process of adjustment in the sense of mutual concessions designed to promote the practical effectiveness of the operation. On the contrary, it was arrived at by the imposition of theoretical and artificial rules which were doubtless believed by the labor members of the Division and by the referee to constitute desirable policy from their particular viewpoint.

In any event, it is clear that the labor members of the Board and the referees approach their task of decision from the standpoint expressed in the respondents' state-

ment quoted above, that "the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption" (Defendant's Memorandum Brief, p. 67; R. 133). The last words of the quotation appear to mean very definitely that the purpose of decisions of the Board should be primarily to satisfy the employes so that they will not interrupt interstate commerce by a possible strike, as might happen if they were not satisfied.

To accomplish this purpose the labor members of the Board, with the concurrence of referees, have succeeded in embodying in many awards abstract principles of the kind above referred to. Awards founded on these principles are then erected into "precedents" which subsequent referees are induced to apply to later cases, regardless of the actual contracts involved in those cases. Against this practice the carrier members of the Board protested to the Attorney General's Committee on Administrative Procedure in the following language (Compilation, p. 221):

> "It is the duty of this Board to hear and decide disputes, properly referred to it, in strict conformity with the agreements between the particular carrier and employees involved, applicable to the issues in question, giving due consideration to the practices and precedents established on that property in the administration of the applicable rule or rules of the agreement under which the dispute originated. *The Act surely did not contemplate that the Board take into consideration in reaching its decision precedents established or rules in effect on properties other than those involved in the dispute.*" (Emphasis supplied.)

The "Statement and Recommendations of Class I Railroads" to the same Committee contains a comprehensive

summary of the "principles," many of them highly abstract and artificial in character, which the Board has developed as the basis for its awards (Compilation, pp. 278-287). Characterizing these principles, the Class I carriers said in their presentation (Compilation, p. 279):

> "The tendency of the Board's decisions is to pluck out of the air so-called general principles, lying outside of the contract of the parties, and by verbal logic carry those principles forward to extreme results regardless of the intention of the parties."

It seems clear from a comprehensive study of the Board's decisions that the labor members of the Board and many of the referees, in the supposed interest of aiding the parties to "conduct the business of interstate commerce without friction and without interruption," conceive it as their duty, under the guise of interpretation, to write a set of uniform nation-wide rules for the railroad industry embodying a particular economic philosophy, irrespective of the actual contract which the employes on different properties may have entered into with their employers. This is apparently what the labor members of the Board had in mind in their statement to the Attorney General's Committee, already quoted (p. 108 above), where they said that the Adjustment Board was never intended to function as a court but that its function was to attempt to reach what they called an "equitable adjustment" (Compilation, p. 212).

If, after an award has been made by the Adjustment Board on the foregoing principles in disregard of the contract rights of the parties, the employer is precluded from any recourse to the courts for a judicial determination of those rights, the employer is obviously left in a position where there is outstanding against it, as what appears to be the sole authoritative declaration of its duties and obligations, an award of the Board which may have been arrived at without giving effect to the provisions of the contract at all.

2. The Existence of an Award of the Board Favorable To the Employes, Coupled With the Denial to the Employer of Any Opportunity for a Judicial Determination of the Issues Involved in the Award and the Rights of the Parties With Respect To Those Issues, Successfully Subjects the Employer to the Exercise of Pressure and Coercion by the Employes to Compel Its Compliance With the Award, Regardless of the Employer's Legal Rights.

(a) *Although an Award of the Adjustment Board is not Enforceable by Legal Procedure if a Suit Under Section 3 First (p) is not Brought to Enforce It, It Constitutes a Determination Made Under Statutory Authority, and as Such, if not Subsequently Shown by Judicial Proceedings to be at Variance With the Contract Rights of the Parties, Its Standing is Sufficiently Impressive to Give Rise to a Claim that Non-compliance with Its Terms Constitutes a Grievance, Which Becomes a New Source of Difference and Friction Between Employer and Employes, and Induces the Application of Pressure to the Former by the Labor Organizations Representing the Latter.*

It is true that an award of the Adjustment Board does not in and of itself impose any technical legal obligation on the employer to comply therewith, in the sense that by non-compliance the employer does not incur any penalties by operation of law. The only way in which the award can be made to result in a legally enforceable liability is through a suit brought under Section 3 First (p) of the Act by the employes in whose favor the award has been issued, and, as has already been seen, such suits are in fact not brought and there is no reason to anticipate that they will be brought. Under these circumstances the contention may be advanced that the employer needs no relief against an improper or unlawful award of the Board because the award is legally a mere nullity and without legal consequences. Petitioner submits that this

argument is wholly unrealistic and formal, since judicial protection is frequently needed and usually granted against harmful practical consequences which invade legal rights, even though such consequences do not arise by operation of law. Accordingly, in determining whether or not judicial relief should be granted against an improper award, the decisive factor is not whether the award does or does not give rise to damage by operation of law, but whether in the absence of judicial relief it will subject the employer to damaging practical consequences which cause an impairment of legal rights. There can be no doubt that it is bound to have this effect.

An award of the Adjustment Board, wholly irrespective of whether or not it is legally enforceable and regardless of whether non-compliance therewith entails legal penalties, obviously is not a nullity but has the status of a pronouncement made under statutory authority by a body established for the purpose of making such pronouncements. Accordingly, so long as such an award is outstanding and is not shown by judicial decision to be at variance with the true rights of the parties, it carries with it a certain quality of authoritativeness, and can be appealed to by the employes in whose favor it was made as the only authoritative statement of the course of conduct which the employer owes to them. In other words, so long as it is outstanding without judicial correction, it affords in practice the basis for a claim by the employes that the employer in failing to comply therewith is guilty of a breach of duty. Such a claim obviously constitutes a grievance and a new source of difference and friction between employer and employes. In the present status of employer and employe relationships, the creation and existence of such a grievance is not a matter which can be ignored. It is a fact of importance, having not only practical consequences but legal implications as well. Thus it is well recognized that an outstanding grievance usually gives rise to an effort on

the part of the labor organizations involved to compel satisfaction by the exertion of so-called economic pressure, *i. e.*, by the exercise of the right to strike or to threaten a strike. That this consequence is likely to follow from non-compliance by the employer with an award of the Adjustment Board is not merely admitted but is insisted upon by the labor organizations in the railroad industry, as evidenced by the position which the respondents have taken in the case at bar. They have in fact taken the position that the reason why it should be held that this suit may not be maintained is in order that awards of the Adjustment Board may continue to be enforced by such economic pressure rather than by judicial proceedings. They frankly contend that the present suit ought not to be permitted, so that no obstacle may be placed in the way of the enforcement of the award here involved and other awards by the so-called collective bargaining power of the employes' organizations. Thus they say (R. 103):

> "The orders of the Board find their primary sanction in the collective economic bargaining power of the employees."

This is in accord with the statements made by Dean Garrison and Dean Spencer, already quoted above (pp. 103-5). In this connection Dean Spencer has said (p. 56 of his article on "The National Railroad Adjustment Board"; see p. 206 of Appendix to Compilation):

> "The labor organizations accordingly rely upon their collective strength to secure compliance with awards granted in their favor. If after the lapse of a reasonable time the carrier does not comply with an award or series of awards, the labor organization involved takes a strike vote."

It thus seems clear that, even though an award of the Adjustment Board does not in and of itself result by

operation of law in legal consequences which may be damaging to the employer, nevertheless non-compliance with an award places the employer in a position where it is exposed to very serious practical damage which will impair its rights unless judicially corrected. This is because, even though an award completely ignores the rights of the employer under the contract on which the award is purportedly based, as it frequently does, nevertheless the employer must either comply with the award, and thereby waive its contract rights, or else subject itself and the public which it serves to the inconvenience and losses resulting from the exertion of economic pressure by the employes. From these oppressive alternatives it can only be relieved by the availability of a real rather than a merely illusory access to the courts for a determination of its rights. It seems clear that the practical damage to which it would otherwise be exposed, and which would otherwise invade its legal rights, affords a sufficient reason why it should be entitled to such access despite the fact that non-compliance with the award in itself does not by operation of law entail any purely legal penalties.

(b) *Since the Possibility of Judicial Adjudication of the Employer's Rights Through Section 3 First (p) is Illusory, It Follows That if a Construction of the Railway Labor Act is Adopted Which Forecloses Judicial Relief to the Employer Through Any Other Form of Proceeding, Then the Employes by Bringing About an Adjustment Board Award Through Their Unilateral Action Can Place the Employer in a Position Where It is Effectively Cornered and Left Without Legal Recourse While Pressure is Being Applied to Compel It to Waive Its Legal Rights.*

What has been said in the immediately preceding subdivisions of this brief must be considered in connection with the fact, developed in an earlier section (pp. 82-92 above), that an award of the Adjustment Board may be

brought about by the purely unilateral action of the employes. If this fact is taken together with the consequences just pointed out of denying to the employer judicial relief except through Section 3 First (p), which amounts in effect to denying it altogether, the result sums up into an air-tight system of coercion which effectually deprives the employer of all rights whatever under its collective agreements with its employes, and makes those agreements mean in fact only what the employes through the exercise of sufficient pressure choose to make them mean. The operation of this system is clear from what has heretofore been said. The employes through their labor organizations, without the consent and against the will of the employer, file a claim with the Adjustment Board demanding that henceforth work shall be performed in a certain manner, with or without an additional claim that damages shall be awarded for its non-performance in that manner in the past. Irrespective of the appearance or non-appearance of the employer before the Board, the labor members and a referee proceed to make an award. The award sustains the claim and grants damages for the past, even though the claim may be directly in the teeth of the pertinent provisions of the contract between the parties, if the labor members of the Board are able by one means or another to convince the referee that such a result will better enable the parties "to conduct the business of interstate commerce without friction and without interruption." The labor organizations then give the employer to understand that, unless it complies with the award by changing its operating practices for the future and paying damages for the past, they will compel it to do so by economic pressure. The employer knows that, if a strike vote is taken and the controversy goes before the Mediation Board or an Emergency Board, those bodies will not concern themselves

with a determination of the legal rights involved.* Accordingly, if it is without a right of recourse to the courts to obtain such a determination, it has no choice but to yield to the pressure applied and forego its contract rights to whatever extent may be insisted upon by the employes. In short, the denial to the employer of the possibility of trying out its legal rights in a normal and orderly way before the courts crowds the employer into a corner where it has no choice but to waive those rights at the insistence of the other party. This is precisely the result which throughout the long history of the growth of law the processes of adjudication were developed to prevent. If such a result is now to be introduced into the field of labor relations, it means the disintegration of the legal order within the community into the ineffective and rudimentary processes prevalent between nations where agreements mean only what superior force can make them mean. It signifies the introduction into an important

* This was made evident in certain instances which occurred shortly after the enactment of the 1934 Act. Thus the National Mediation Board reported as follows in its First Annual Report (1935) (p. 29):

> "In one case, however, a strike of 4,500 employees was threatened because the employees insisted that the carrier was obligated to obey the decision, and *if any court action was to be taken the carrier should take the initiative in asking for a court order to set aside the award.*
>
> "In view of the threatened strike which would have seriously interrupted transportation service, the Board assumed jurisdiction on its own motion, not of the merits of the decisions of the Adjustment Board, but of the proper process of affirming or setting aside the awards. After 2 weeks of negotiations, an agreement was reached and the case amicably settled." (Emphasis supplied.)

Again, in its Second Annual Report (1936) the Mediation Board stated (p. 34):

> "Some railroad managements have insisted that the awards of the Adjustment Board were not enforceable and therefore have declined to make them effective, suggesting to the labor organizations that they present the cases to the courts. Employees have taken the position that the court procedure given to them did not take away from them the right to strike in order to compel compliance with the awards of the Adjustment Board. We have heretofore called attention to one case where trustees of a railroad in bankruptcy took this position, with the result that the employees took a strike ballot and when the Mediation Board intervened the case was settled with the aid of the United States District Judge. The same procedure has been followed in several other instances always resulting in an ultimate settlement without a strike."

field of law of what has been vividly called "international anarchy."

At the original argument a suggestion was made that, even if the employer were entitled to a judicial determination of its rights after an award had been made by the Board, and were successful in obtaining a decision adverse to the Board's award, this would not prevent the employes from striking to enforce the award if they so desired, and that, therefore, the judicial determination would be futile, ineffective and vain. A suggestion was also made that the courts ought not to be put in the position of possibly having to make a decision which the labor organizations would refuse to accept. The first suggestion, that a court's decision would be ineffective because the employes might strike against it, ignores the fact that there is at least an equal possibility that, as the Chief Justice pointed out during the argument, it might serve to "enlighten" them. The respect which they should have as citizens for the processes of justice might conceivably cause them to accept a judicial determination of their rights. At any rate the possibility of such an outcome might be regarded as sufficient to make resort to the courts not wholly vain. The second suggestion, that courts ought not to be put in the position of possibly having to make a decision which labor would refuse to accept, raises a more serious and fundamental issue. It raises nothing less than the issue of whether or not any group in the community, because of its strength, shall be treated as above the law and beyond the reach of the ordinary processes of adjudication. There can be only one answer to that question if civil society is not to be remitted to the rule of force or of so-called agreements and adjustments based upon the threat of force on the one hand and the fear of force on the other.

Apart from the pressure deliberately exerted by the employes, to which the employer would be subjected if denied an opportunity for judicial determination of its

rights, the employer if denied that opportunity would also be subject to another and very effective kind of pressure in favor of waiving those rights, because of the way in which an award of the Adjustment Board operates with respect to the accumulation of damages. This is clearly illustrated by the circumstances of the case at bar.

When a carrier in petitioner's position is faced with an award of the Board like that in the present case, requiring it to change its operating practices and to pay damages for not doing so, it has two alternatives before it. On the one hand, it can immediately comply with the award, take the work away from the employes who have been performing it, and thereafter permit that work to be performed by the other employes who have obtained the award. If it does this it will be sacrificing its contract rights and also in most instances, as in the case at bar, will be adopting a more expensive and less efficient method of operation, without any judicial determination as to whether or not it is legally obligated to do so. On the other hand, it can refuse to comply with the award and continue its practices as before. But if it adopts the latter alternative, even though the employes refrain from the exertion of economic pressure through the threat of a strike, each additional day on which the carrier continues to refuse to permit those employes to do the work will add to the amount which it will have to pay to them if it should ultimately be determined that the award of the Board is in fact in conformity with the legal rights and obligations of the parties. At the same time, on every such additional day that the carrier refuses to put the award into effect, it must continue of course to pay the other employes who actually do the work. It thus subjects itself, in short, to the possibility of what amounts to a double liability.

In other words, the total cost to the carrier in connection with the dispute in question would be very much less if it sacrificed its right to a judicial determination of

the issues and complied promptly with the Board's award, than the cost would be if it refused compliance and was ultimately compelled to yield to the employes' demands. If a carrier in petitioner's position is to be denied the opportunity to obtain judicial relief with reasonable promptness after an Adjustment Board award has been entered against it, there is no way for it to avoid the risk of having ultimately to pay out very much larger sums, except by prompt compliance with the award. It is obvious that under such circumstances the passage of time following the Board's award and the consequently continuing increase of the sum which the carrier may ultimately have to pay operates to increase constantly the pressure on the carrier to comply promptly with the Board's award. The result of denying the carrier access to the courts thus forces it to comply without a judicial determination as to whether or not it is legally obliged to do so, and in spite of the fact that compliance may unnecessarily and improvidently increase the costs and at the same time impair the efficiency of its operation to the disadvantage of the public which it serves.

These are precisely the circumstances which make prompt relief imperative in the interest of elementary fairness, and which the declaratory judgment procedure was devised to provide.

Since the employes as a matter of settled policy refuse to bring suit under Section 3 First (p) of the Act, and since the carrier has no other method of obtaining a judicial determination of its rights and obligations under its contract, a declaratory judgment proceeding becomes the only available means to petitioner for obtaining such necessary relief. If declaratory relief is granted and the carrier is thereby presently advised of its rights and obligations, it could if necessary change its operating practices promptly and thus save itself from a substantial portion of the heavy penalty payments demanded by respondents and accruing in their favor if their claim should prove to be justified. As stated by Judge Stephens

in his dissenting opinion below (p. 259 of 124 F. (2d); R. 356):*

> "In *Aetna Life Ins. Co.* v. *Haworth, supra,* the mere increase in the amount of insurance policy claims through the accrual of interest, and the inconvenience of having to be prepared to meet the claims at some future time, were held sufficient grounds for declaratory relief in respect of legal rights and obligations arising under insurance contracts. *A fortiori* the uncertainties and hazards to which the appellant under the facts stated in the instant case is subjected are sufficient to invoke exercise of declaratory jurisdiction. In *E. Edelmann & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852, 854 (C. C. A. 7th, 1937), Lindley, District Judge, speaking for the court, said, in respect of the purpose of the Declaratory Judgments Act:
>
> > 'It was the congressional intent *to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued'.*" (Emphasis supplied.)

It follows from the above considerations that the denial to the employer of access to the courts after an award of the Board except in a Section 3 First (p) proceeding brought by the employes has the effect of placing the

* As a matter of fact, the majority of the Court of Appeals below did not deny that the present controversy would be an appropriate one for the exercise of declaratory judgment jurisdiction in the absence of special statutory impediment. However, the majority below took the position that such special statutory impediment existed in the present case, in that Section 3 First (p) must be construed as manifesting a Congressional intent that the judicial remedy therein provided should be exclusive of all other methods of judicial determination of the rights of the parties, in order to preserve to the employes the advantages which they have in a Section 3 First (p) proceeding and which Congress must have intended them to have. This position of the majority of the Court of Appeals is discussed and answered at pages 172-82 below.

employer in a position where, because of the nature of the award and its operation to increase from day to day the employer's potential liability, and as a result of the economic pressure which the employes are able to exert and do exert most effectively through their collective power, the employer is coerced into complying with the employes' wishes, as expressed in the Board's award. It likewise follows from what has been said that respondents are in error in claiming that Section 3 First (p) provides an adequate opportunity to the employer for a judicial determination of its rights and also in contending that the compulsion to which the employer is subject is "extra-legal" and therefore should not be recognized or considered by the Court.* Certain additional contentions of respondents in this respect remain to be considered.

3. The Contention of Respondents that a Suit Brought by the Employes Under Section 3 First (p) Affords the Employer an Adequate Opportunity for Judicial Relief, and Should Therefore be Held to be Exclusive, Because of Similarity Between the Language of Section 3 First (p) and the Language of Certain Sections of the Interstate Commerce Act and the Packers and Stockyards Act Providing for Statutory Reparation Suits Under Those Acts, Is Unfounded, Because the Analogy Is Inapt and Because Construction of Those Provisions of the Interstate Commerce Act and the Packers and Stockyards Act as Providing Exclusive Remedies Would Not Have the Same Actual Effect as Would the Construction of Section 3 First (p) of the Railway Labor Act for Which Respondents Contend.

The argument presented above to show that, in view of the nature and operation of Adjustment Board awards,

*For further discussion of the reality and effectiveness of the compulsion to which the employer is subject and of the question whether or not it is "extra-legal" and whether or not it should be considered by the Court, see pp. 232-38 and 242-49 below.

the employer is not afforded an adequate or proper opportunity for judicial relief by the statutory suit provided for employes under Section 3 First (p) serves also to answer and refute the contention which respondents have advanced on the basis of a supposed analogy between Section 3 First (p) and the reparation-suit provisions of the Interstate Commerce Act and the Packers and Stockyards Act.

Respondents have contended that, in spite of the consequences pointed out above which would inevitably follow from denying to the employer all right of access to the courts save in a proceeding under Section 3 First (p), nevertheless such a result is required because the language of Section 3 First (p) closely follows the provisions of the Interstate Commerce Act and the Packers and Stockyards Act relating to reparation suits under those statutes. Respondents claim that these reparation suit provisions provide an absolutely exclusive judicial remedy with respect to the situations to which they are applicable, and that therefore, since similar language is used in Section 3 First (p) of the Railway Labor Act, the remedy provided by that section must likewise be held to be exclusive, irrespective of the consequences to the employer.

The first answer to this contention is supplied by the elementary rule of law that, in spite of identity of language, statutory provisions will not be given an identical construction where there is such difference in the subject matter and operation of the provisions in question as to make identity of construction inappropriate. Where such difference in subject matter and operation exists, the two statutes are said to be not *in pari materia;* and the rule is that similar or identical statutory language will be given a similar or identical construction only where the two statutes are *in pari materia.* It will be shown below that the nature and consequences of an Adjustment Board award are so essentially different from those of a reparation order of the Interstate Commerce Commission that

in the former case the results of denying to the employer access to the courts are oppressive and arbitrary in a sense which is not true with respect to the statutory procedure for enforcing reparation orders of the Commission. Accordingly it follows that, whatever construction may have been placed, or should properly be placed, on the reparation-suit provisions of the Interstate Commerce Act, such construction is not controlling or persuasive with respect to the construction of Section 3 First (p) of the Railway Labor Act.

There is a second answer to this argument which respondents seek to draw from the reparation-suit provisions of the Interstate Commerce Act and the Packers and Stockyards Act. This is that, as will be shown below, the reparation-suit provisions of the Interstate Commerce Act do not go so far as to establish any absolute rule of exclusiveness, as respondents seem to suppose, but have simply been held to require that, where the statutory suit for reparation is available, certain other remedies, as, for example, an injunction suit under the urgent Deficiencies Act to set aside the order, are not available.

These two answers to respondents' efforts to avail themselves of the supposed analogy of the reparation-suit provisions of the Interstate Commerce Act and the Packers and Stockyards Act will now be developed in greater detail.

(a) *The Rule that Identical Statutory Provisions Should Ordinarily be Given Identical Construction Does not Apply Because of Important Differences Between the Statutes in Question, viz., the Interstate Commerce Act and the Railway Labor Act, and those Statutes Are Therefore not in Pari Materia and not to be Construed Alike.*

Identity in the language of two separate statutes does not lead to identity of construction where the two statutes are not *in pari materia, i. e.*, where they are not similar

in objects and purposes and in the type of circumstances to which they apply. This is firmly settled in the cases.

A classic statement of the rule is that given by the Circuit Court of Appeals for the Eighth Circuit (including Circuit Justices Sanborn and Van Devanter) in *United States* v. *Colorado & N. W. R. Co.*, 157 F. 321 (1907), at page 330, as follows:

> "The rule in pari materia • • • the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable • • • because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different."

It would seem to require no argument to show that a statutory provision designed to enable individual shippers to collect money damages for past exactions of unlawful rates is directed against an entirely different evil and seeks to attain an entirely objective from another statutory provision designed to enable employes to compel their employer to assign to them in the future work to which they claim a right under a contract, and to exclude others from the performance of that work. The remedy provided by Section 16(2) of the Interstate Commerce Act is available only in the case of non-compliance by a carrier "with an order for the payment of money." The remedy provided by Section 3 First (p) of the Railway Labor Act covers any order of the Adjustment Board. The order of the Adjustment Board involved in the present case, and indeed most awards and orders of that Board, are in effect directions to the carrier as to its future operating practices, as well as orders to pay money damages. By sustaining a claim, the Board, in substance, says to the carrier that it must henceforth permit certain men to do certain work and not allow other men to do that work, and must also pay money damages for each day in which the claimants are not permitted to do the work.

A legal proceeding to give effect by mandamus to a claim of that kind is altogether different in its incidents, consequences and repercussions from a suit merely to recover a sum of money. Accordingly, the grounds on which it might be held that a statutory action to recover a certain sum of money was by implication exclusive of all other forms of judicial remedy would have no necessary applicability to the determination of whether or not the statutory proceeding to enforce a claim to certain work was exclusive. By their difference in terms, the one statute referring only to money claims and the other covering claims to enforce future conduct, the two statutory provisions differ in such essential particulars that rulings with respect to one are not controlling with respect to the other, under the *in pari materia* rule above stated.

Furthermore, the situations and circumstances to which Section 16(2) of the Interstate Commerce Act and Section 3 First (p) of the Railway Labor Act are respectively applicable differ in such significant and material respects that a construction appropriate to the one provision would not be appropriate to the other.

Attention has already been called above (pages 113-23) to the economic pressure to which a carrier-employer is subjected, under the facts of this case, to comply with the award without a judicial determination of its rights. This pressure is not present in the case of mere claims by individual shippers for money damages based on past transactions which do not affect operating methods for the future. The significance of an award of the Adjustment Board with respect to the future operating practices of the carrier lends an altogether different and more pressing character to the carrier's need for judicial determination of its rights than is the case in connection with a reparation order of the Interstate Commerce Commission. Not merely must the carrier run the risk of choosing between immediate compliance with the award of the Adjust-

ment Board by a change in its method of operation or of having to pay a much larger sum, if the claimant ultimately brings the statutory action and the claim is sustained, but the carrier is furthermore exposed, as already pointed out, to the pressure of the economic bargaining power of the employes. None of this pressure is present in the case of a reparation claim for damages under the Interstate Commerce Act. The presence of such pressure in the one case and its absence in the other establishes such a plain difference between the two statutes—a difference which is reflected in the fact that one statute is expressly limited to money claims while the other is not—that under the *in pari materia* rule it seems clear that a construction of the one statute giving a quality of exclusiveness to the remedy therein provided is not by necessary or even reasonable implication transferable to the other.

(b) *The Decisions Under the Reparation-Suit Provisions of the Interstate Commerce Act Do not Go so Far as to Establish Any Absolute Rule of Exclusiveness, but Simply Hold that Where the Statutory Suit for Reparation is Available Certain Other Remedies are not Available.*

The considerations just advanced impel the conclusion that, even if Section 16(2) of the Interstate Commerce Act and the analogous provisions of the Packers and Stockyards Act had been so construed as to provide that the statutory actions created by those Sections were absolutely and in all respects exclusive of all other forms of judicial remedy, it would not follow by necessary implication that a like quality of exclusiveness must, as respondents contend, attach to the statutory remedy under Section 3 First (p) of the Railway Labor Act. However, the decisions under the reparation-suit provisions of the Interstate Commerce Act do not go so far as to establish any absolute rule of exclusiveness, but have simply held that where the statutory suit for reparation is available certain other statutory remedies are not available.

Thus, for example, it has been held that, where the Interstate Commerce Commission has made a reparation order so as to entitle the successful claimant to bring an action under Section 16(2), the order of the Commission is not of such a character as to conform to the definition of an order under paragraph 28 of Section 41 of the Judicial Code authorizing suits to enjoin certain orders of the Commission, and accordingly a statutory suit to enjoin a reparation order may not be brought under that section: *Baltimore & O. R. Co.* v. *United States*, 87 F. (2d) 605 (C. C. A. 3rd, 1937). Likewise, in the earlier case of *Brady* v. *Interstate Commerce Commission*, 43 F. (2d) 847 (N. D. Va., 1930), it was said that, since a reparation order is not enforceable by the Commission, a suit for a statutory injunction under that section of the Judicial Code will not lie against the Commission to restrain or set aside the order.

These decisions are wholly intelligible without the necessity of presupposing any absolute rule that the judicial remedy provided by Section 16(2) of the Interstate Commerce Act is exclusive of all other forms of judicial relief. Their holding has no direct bearing upon the disposition of the case at bar. The present proceeding is not a suit for an injunction. If it were, it would have been brought against the National Railroad Adjustment Board in Chicago. Petitioner is not contending that the award of that Board can be enjoined. On the contrary, petitioner is here contending merely that the award should not operate as a bar to the exertion of petitioner's present legal rights, including the right to have its contract relations with the respondent adjudicated in a proceeding for a declaratory judgment.

Respondents have asserted below that the statutory procedure under Section 16(2) of the Interstate Commerce Act operates to bar a shipper who has failed to win an award before the Interstate Commerce Commission from subsequently proceeding in court against the carrier, and

have cited for this proposition *Minds* v. *Pennsylvania R. Co.*, 237 F. 267 (E. D. Pa., 1916) (see R. 108), thereby seeking support for the contention that because of Section 3 First (p) of the Railway Labor Act an employe who has failed to win an award from the Adjustment Board is henceforward barred from any form of judicial relief on his contract rights against the employer. The *Minds* case was a suit by a claimant who had been successful before the Commission, and is, therefore, not authority for the proposition for which it is cited. In fact it now seems to be clear that a shipper who has been refused relief by the Interstate Commerce Commission is not by that fact alone necessarily barred from resort to the courts: *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 136-44, 59 S. Ct. 754, 760-64 (1939). Petitioner will demonstrate below (pp. 167-72) that an employe whose claim has been denied by the National Railroad Adjustment Board may nevertheless sue the employer on his contract under the general jurisdiction of the courts. But even if it should be held that he may not, this would not preclude the employer from a right to sue, since the position of the employer against whom an award has been entered, without its consent even to have the controversy submitted to the Board, is so essentially different, and its need for judicial relief is correspondingly so much greater (see pages 113-23 above), that the considerations which would apply to the employer are not the same as those upon which the right of the employe to sue might be denied after such employe has voluntarily chosen the Board as his forum for relief and has failed to win its support for his claim. Moreover, as will be shown below (pp. 188-91), if the employe should be held to have waived his right to resort to the courts as a result of his voluntarily electing to have his claim determined by the adjustment procedure, the employer would not be barred by any such reason from resort to the courts, because the employer's appearance before the Adjustment Board in response to the employe's

unilateral submission does not constitute in any sense a voluntary choice or election of the adjustment method by the employer.

It follows from what has been said above, first, that even if it were true, as respondents contend, that the cases establish an absolute rule of exclusiveness with respect to the methods of review provided in Section 16(2) of the Interstate Commerce Act and in the analogous sections of the Packers and Stockyards Act, nevertheless those provisions of the Interstate Commerce and Packers and Stockyards Acts cannot be considered to be *in pari materia* with Section 3 First (p) of the Railway Labor Act, and therefore do not provide an apt statutory analogy to that section, and second, that the cases do not in fact establish any such absolute rule of exclusiveness even with respect to the methods of review provided in those sections of the Interstate Commerce and Packers and Stockyards Acts. Accordingly, respondents' appeal to the supposed analogy of the reparation-suit provisions is wholly ineffective to refute petitioner's contention, established above, that the employer will be completely deprived of any adequate opportunity for judicial protection of its rights if, after an award by the Adjustment Board, the statutory procedure through Section 3 First (p) of the Railway Labor Act should be held to be exclusive.

4. The Inadequacy of the Judicial Relief Available to the Employer, If Its Right of Access to the Courts After an Award of the Adjustment Board Should Be Held Limited to a Proceeding Brought by the Employes Under Section 3 First (p), is not Cured or Compensated by the Opportunity Which the Employer Would Supposedly Have Under the Doctrine of the Moore Case to Resort to the Courts Prior to the Submission of The Dispute to the Adjustment Board by the Employes.

Assuming that the *Moore* case was properly decided and that either party is entitled to resort to the courts,

prior to submission of the dispute to the Board, for a judicial consideration and determination of the controversy, it may be contended that the opportunity thus given the petitioner after the dispute arose is sufficient to protect its legal rights, and that a right of access to the courts after submission of the dispute to the Adjustment Board is not needed by the petitioner as an additional safeguard. This is in fact suggested in the opinion of the majority below, where it is said (p. 249 of 124 F. (2d); R. 345):

> "• • • the carrier, under the decision in *Moore* v. *Ill. Central R. R., supra,* can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act."

Thus, the majority below seem to say that the opportunity given the employer under the doctrine of the *Moore* case to resort to the courts prior to the submission of the dispute to the Adjustment Board is adequate to protect its legal rights.

But it is not true that the need of the employer—shown above to be a very real one—for judicial relief after issuance of an award of the Board is rendered non-existent by virtue of the fact that petitioner could have gone into court, under the doctrine of the *Moore* case, before the dispute was submitted to the Adjustment Board by the employes. It has been shown above (pp. 82-92) that, when the employes have made their election and have submitted the dispute to the Adjustment Board, the employer, even though the submission was without its consent, has no practical alternative except to appear before the Board and defend itself as best it can against the unilateral submission. Therefore, if the only opportunity which the employer is to have for judicial relief in the courts is between the time the dispute arises and

negotiations on the property have ended, on the one hand, and the time of submission of the dispute to the Board by the employes, on the other hand, then every such situation will be likely to produce a race between the employer, seeking to get into court, and the employes, seeking to submit the dispute to the Board. Surely it was not the intent of Congress to instigate such a race between the parties, and the discussion above has shown that neither the legislative history nor any alleged policy of the Act indicates such an intent.

Throughout the dispute the employes are the claimants, and the initiative therefore lies with them to determine what remedy should be employed for the purpose of seeking enforcement of their claim. The employer should not be required to anticipate what course the employes will choose and to act in advance of their choice, at the risk of making a wrong guess. To hold that the employer is thus compelled to anticipate the employes' choice of remedies, at the risk of losing altogether its opportunity for judicial consideration of the controversy, would mean that the employer would have no practical alternative but to take every dispute into the courts, as promptly as possible, in order to attempt to forestall submission by the employes of the dispute to the Board. Such an interpretation of the Act would certainly result in the submission to the courts of many more cases of disputes between rail carriers and their employes than would otherwise occur, since many of the disputes would be ones which might otherwise be finally "adjusted" by an award of the Adjustment Board, or which the employes themselves might recognize as not having sufficient merit to press beyond the stage of negotiations on the property.

Thus, to hold that the employer's only opportunity for judicial consideration and determination of a dispute with its employes is in a suit instituted by the employer before the employes have submitted the dispute to the Adjustment Board would result in a race between the

employer and the employes, the employer in pursuit of the only remedy available to him and the employes in pursuit of the remedy which they prefer and which promises them greater success in attaining their desired result. If the employer should be successful in that race in all or most instances, it would mean the submission to the courts of a great number of such disputes which otherwise might not find their way into the courts. But the probability is that the employer would not be successful in that race in all or even many instances of disputes, since the machinery for submitting disputes to the Adjustment Board is much simpler and more readily available than is the procedure for getting into court. All that the employes have to do in order to set in motion the Adjustment Board machinery is to write a letter to the Board, saying that they intend to submit a particular dispute, and the Board then notifies the carrier that the employes' so-called "submission" or statement of its claim with respect to that dispute will be filed on a given day, and the employer's statement may be filed on or before the same day. It might very well be successfully contended by the employes that this invocation of the Adjustment Board's machinery was sufficient to constitute a submitting of the dispute to the Board for the purpose of excluding subsequent resort by the employer to the courts. On the other hand, before a proceeding can be properly instituted in court, consideration must be given to the choice of venue and forum, an adequate complaint must be prepared, and service thereof must be made on all necessary parties. Even after these preliminary steps have been taken, the complaint may be subject to a demurrer or motion to dismiss or other pleading raising questions of lack of jurisdiction, and if such plea to the jurisdiction is successful, then another proceeding must be begun and the same preliminary steps must again be taken.

Obviously, under such circumstances the race between the employer and the employes would in many and prob-

ably in most instances be won by the employes. Moreover, let it be supposed that the employer did win the race in some instances and was successful, for example, in reaching the courts with respect to a case involving a particular operating practice, prior to submission of the dispute to the Board. Let it also be supposed that the court decided the case in favor of the employer. Unless the employer was able to take into court every instance of a claim by an employe arising out of the same operating practice and involving the same question, the employes could, notwithstanding the court's decision, submit the next dispute involving the same practice and the same question to the Board, and there would of course be no assurance that the court's decision would be followed by the Board, which might very well reach its own independent conclusion on the matter, based on a supposed desire to arrive at an "adjustment." Therefore, unless in the case of every claim brought by an employe the employer could manage to reach the courts prior to submission of the dispute to the Board, regardless of whether the claim involved exactly the same questions as those previously adjudicated by a court, the opportunity to resort to the courts under the doctrine of the *Moore* case would not provide the employer with the judicial relief needed, since the employes could place the employer in the same position in which it would find itself if it had no such opportunity, by obtaining from the Board an award sustaining their position despite the prior court decision to the contrary. Thus, if the employer's only recourse to the courts should be held to be that available to it under the doctrine of the *Moore* case prior to submission of the dispute to the Board, then it would be necessary for the employer to maintain a perpetual race with the employes and to attempt to take every individual claim into court prior to submission of that claim to the Board. It is plain not only that such a perpetual race was never intended by Congress but also that it would be impossible for the employer to succeed in it.

In the face of these facts it cannot be claimed that the employer's opportunity to resort to the courts prior to submission of the dispute to the Adjustment Board by the employes provides the employer with an adequate judicial remedy to protect its legal rights. Clearly, such a remedy would in fact be illusory, since in many or most cases the employer would have no opportunity at all to get into the courts before its access thereto was barred by submission of the dispute to the Adjustment Board, and in such cases the employer would in fact be deprived altogether of access to the courts for a judicial determination of its rights and obligations.

But, even if adequate opportunity were available to the employer, under the doctrine of the *Moore* case, to resort to the courts prior to submission of a dispute to the Board, this would nevertheless not provide the employer with the opportunity which it needs for judicial relief, since, for the reasons shown above (pp. 113-23), the mere existence of an award of the Board creates in and of itself a need for the employer to have access to the courts in order to obtain a judicial determination with respect to the issues involved in the Board's award. As shown above, an award of the Board, even though not legally enforceable as such, has nonetheless a certain quality of authoritativeness, and so long as the award is outstanding without judicial correction, it constitutes a grievance giving rise to a new claim by the employes. The award thus constitutes a new source of difference and friction between employer and employes, which stimulates an effort on the part of the labor organizations involved to exert their economic power for the purpose of compelling compliance with the award, and the fact that the award is an authoritative pronouncement by a body created under statutory authority lends added strength and insistence to the exercise of economic pressure by the employes. Furthermore, the mere existence of the award representing as it does a

potential liability of a continually increasing amount, constitutes, as pointed out above, a danger to the employer which may result in its being compelled ultimately to pay much more if it should refuse compliance than would be the case if it waived its legal rights and complied immediately with the award. If the employer is not to be compelled either to yield to this combined pressure, at the sacrifice of its legal rights, or to run the risk of suffering the serious inconvenience and losses resulting from full application of the pressure, it must have a real and substantial opportunity to resort to the courts for judicial relief after an award of the Board has been issued.

Clearly, therefore, for these reasons, the employer's need for judicial relief subsequent to the submission of a dispute to the Adjustment Board by the employes and the issuance by the Board of an award with respect thereto is not satisfied or eliminated by the limited and inadequate opportunity which the employer may have, under the doctrine of the *Moore* case, of resorting to the courts prior to submission of the dispute to the Board.

C. The Policy of the Railway Labor Act Does not Require That It Should Be Construed So as to Produce the Arbitrary and Oppressive Results Which Would Follow from Denying the Employer Access to the Courts on Its Own Initiative After an Award of the Board.

In the preceding sub-divisions of this section of the brief it has been shown that, if after an award of the Adjustment Board the employer is permitted no other form of judicial relief than that afforded in a suit brought by the employe under Section 3 First (p), the employer will actually be deprived altogether of an opportunity for judicial determination of its rights.

That the Railway Labor Act should be construed to require this result by implication has been urged by the

respondents on grounds drawn from the alleged "policy" of the Act. This argument will now be examined and will be shown to be without foundation save by assuming the point to be proved.

Respondents throughout their argument in the courts below suggested, sometimes expressly and sometimes by implication, that to allow the employer to seek judicial relief after an award by the Adjustment Board would be contrary to the broad "policy" of the Railway Labor Act and would render the provisions of that Act unworkable. It was intimated that if the employer were accorded such a right, the use of the adjustment procedure would be discouraged, adjustment awards would become futile and lose their effect, litigation would be unduly multiplied, and a supposed Congressional intent of "making resort to the Courts unattractive to the carriers" would be defeated (Defendant's Memorandum Brief, pp. 37-38, 40-41; R. 103-104, 106-107).

It will be shown below that it was clearly not the intent of Congress to prevent claims which had been "adjusted" by an award of the Adjustment Board from being thereafter subjected to judicial re-examination by a court; that therefore Congress cannot be said to have entertained the view that judicial re-examination of such claims would defeat the effectiveness of the adjustment procedure or render Adjustment Board awards futile and ineffective; and that the only basis for attributing to Congress any supposed intent of "making resort to the Courts unattractive to the carriers" is to assume the very point to be proved, and attribute to Congress, without any foundation therefor, an intent to place the employer in a position where, as a result of being denied access to the courts, it can be effectively coerced into complying with awards irrespective of whether or not they disregard the terms of its contract.

1. Congress Had No Intention to Exclude the Possibility of Judicial Determination of Controversies Which Have Already Been Submitted to the Adjustment Board, Since Section 3 First (p) Expressly Provides for Judicial Re-examination of Controversies Already "Adjusted" by Awards of the Board.

It is clear that Congress had no intention to exclude the possibility of subsequent judicial determination of controversies which have already been submitted to the Adjustment Board. The existence of such an intent is negatived by the inclusion in the statute of Section 3 First (p), concerning which so much has already been said. Certainly it is to be assumed that Congress in incorporating that section in the Act was acting in good faith and with the intention and expectation that the section would be used, although, as has been seen, that hope has been frustrated by the policy of the labor organizations. If Congress did act in good faith, it is clear from the provisions of the section that Congress saw no incompatibility between the adjustment procedure of the Act and the possibility that a controversy which had been the subject of an Adjustment Board award should thereafter be fully re-examined judicially in a court of law.

In this connection, a feature of this judicial re-examination of the controversy as contemplated and intended by Congress is worthy of note. Section 3 First (p) provides that when a suit is brought under its provisions the suit shall be not upon the award of the Adjustment Board itself, but on the claim—"the causes for which he [the plaintiff] claims relief"—and it is provided that in such a suit the findings and order of the Adjustment Board shall merely constitute *prima facie* evidence of facts. This can only mean that the suit is to be upon the original claim under the contract between the parties,* which is thus brought directly before the court for interpretation

*See also discussion of this point at pp. 27-30 above.

without regard for the "adjustment" arrived at by the Board, and the Board's action is regarded only to the extent of according *prima facie* effect to its findings of fact where such findings have been made. This is precisely the provision which might be expected, in view of the nature and functions of the Board, its method of proceeding, and the fact that the Board's award may be an "adjustment," arrived at without regard to the parties' contract rights. Clearly no such adjustment made by such a body without regard to contract rights ought to be imposed, or could properly be imposed, on the parties by law or by the action of a court; and accordingly in a proceeding under Section 3 First (p) the court is required by the terms of the statute to enforce not the award but only the legal rights upon which the claim is founded.

It appears from this examination of the nature of the suit provided for by Section 3 First (p) that Congress was not only not hostile to, but actually contemplated and intended, a full judicial re-examination and determination of the contract rights of the parties after an award of the Adjustment Board, before the employer could be obliged to comply therewith. It may be remarked in passing that this is doubtless the reason why labor organizations decline to make use of the procedure set up under Section 3 First (p). They recognize that if, as is often the case, an employe obtains from the Board an award embodying a favorable adjustment which goes beyond his contract rights and involves a disregard of the rights of the employer, the employe will not be able to sustain such an award in court in a proceeding under Section 3 First (p). Accordingly they avoid the risk of such a result by the policy of not making use of the procedure provided for by that section. However, this policy of the labor unions does not and cannot alter the intent of Congress expressed in the statute; and so far as that intent is concerned, it is apparent from the statutory pro-

vision that Congress saw no incompatibility between the adjustment procedure which it was establishing and the possibility of a full judicial re-examination in court of the contract rights of the parties after the adjustment procedure had resulted in an award of the Board.

This is again what might be expected in view of the nature and purpose of the adjustment procedure, so long as that procedure is recognized as having the purely voluntary character attributed to it by this Court in the *Moore* case. If the adjustments made by the Board are recognized as voluntary, then there is nothing inherently oppressive or inconsistent with legal rights in permitting the Adjustment Board to formulate awards which may depart from the contracts of the parties, provided that it is clear that the parties are free to accept those awards or not, as they choose. If this is clearly recognized, it may very well happen that for one reason or another an employer may be willing to accept voluntarily an adjustment made by the Board in disregard of the employer's strict contract rights, and the employer would of course be free to do so. However, the Act makes clear in Section 3 First (p) that the employer may not be compelled to do so by court action; and if an effort should be made to enforce the award by the processes of law, then the Act provides and Congress intended that there shall be a full judicial consideration and determination of the parties' legal rights.

This provision of the Act also makes intelligible the fact, already discussed in an earlier section of this brief in response to the Court's second question, that an award may be entered by the Adjustment Board against the employer at the sole instance of the employe and even if the employer does not appear in the proceedings before the Board. Clearly, under such circumstances an award which would "adjust" the dispute in disregard of the employer's contract rights would, if capable of enforcement, be a violation of the most elementary principles

of justice. However, in the light of what has just been said, it is not capable of enforcement. The employer is free to accept the award voluntarily if it cares to do so. If, however, it refuses, the award can only be "enforced" at law through a proceeding under Section 3 First (p), in which the employer will have an opportunity to appear and present its case, and in which the contract rights of the parties will be fully examined and no decree entered which is not in accord with those rights.

It is thus not merely consistent with the Congressional scheme for "adjustment," but is actually required for the purpose of preserving the voluntary character of that scheme, that after the action of the Adjustment Board there should remain an opportunity for a judicial consideration and determination of the parties' contract rights in order that adjustments which disregard those rights, but which might be satisfactory to the parties if accepted voluntarily, may not be imposed upon and enforced against one of the parties without its consent. Provision to this effect is accordingly made in Section 3 First (p), as noted above, if the employes seek to enforce their claim by legal action. If, however, in order to avoid this result, they astutely refrain from using Section 3 First (p) and seek to enforce an award by pressure and coercion, it is clearly not inconsistent with, and is actually required by, the Congressional intent and purpose that the employer should have a like opportunity for a judicial determination and declaration of its contract rights. The only grounds of supposed policy which could be alleged against such a right of access to the courts by the employer are grounds which could be urged with equal force against the procedure under Section 3 First (p); and the fact that those grounds are not applicable is shown by the incorporation by Congress of Section 3 First (p) in the Act.

2. The Availability of Judicial Redress to the Employer Would Have No More Effect Than Would the Judicial Redress Available to the Employes Under Section 3 First (p) in Unduly Multiplying Litigation, and Would Strengthen Rather Than Weaken the Standing and Effectiveness of Adjustment Board Awards.

It is said that, if judicial redress is available to the employer in one case after an award of the Adjustment Board, it must necessarily be available in all cases (Defendant's Memorandum Brief, pp. 40-41; R. 106-7), which is of course true; and, in addition to the implication that this would unduly multiply litigation, it is also said that it would have "undesirable effects * * * upon the Board" (R. 107) and "seriously interfere with the operations of the Board" (R. 106). The answer is that if these results would follow from allowing the employer access to the courts, they are no different from the consequences which would follow if employes actually took advantage of the invitation held out to them by Section 3 First (p) to resort to the courts, as Congress obviously intended them to do. In other words, assuming that judicial proceedings after an award would multiply litigation and interfere with the operations of the Board, there is no reason to suppose that litigation would be multiplied to any greater extent, or that the operations of the Board would be interfered with any more seriously, if such proceedings happened to be instituted by the employer than if they were instituted by the employe under Section 3 First (p).

It is no answer to this conclusion to say that employes do not in fact bring suits under Section 3 First (p), since the point under discussion is the intention of Congress, and as to this no relevant evidence is afforded by what the employes may or may not in fact do. What is relevant is that it was evidently the intent of Congress that the employes should be free to bring suit in court on every favorable award of the Board if they cared to do

so. This would certainly open the doors as wide to litigation, and would to that extent multiply litigation as greatly, as if the like right of the employers to institute suits were recognized, since under the provisions of Section 3 First (p) every award in favor of an employe without exception is potentially the subject of a law suit.

The spectre of excessive litigation is no more impressive and should be no more persuasive in the present connection than when urged as an argument generally against the right to judicial review of the determination of quasi-judicial administrative boards and commissions. It is established that there is a right to such review (see pp. 238-44 below), which means that every such determination may issue in a potential lawsuit. This possibility can be presented as fraught with the danger of clogging the courts and destroying the effectiveness of administrative action. The reason why this is not deemed a sufficient reason for denying access to the courts is two-fold. In the first place, even if the danger were actual it would only mean that, where new rights and obligations emerge as a result of new legal and social relationships, it is no excuse for denying recognition to those rights and obligations in the courts, that the result would necessarily be to increase the business of the courts. The second reason is that the alleged danger is not real. Just as only a few of the vast number of contracts entered into ever find their way into the courts and become the subject of judicial inquiry and determination, so in actual experience only a few of the total number of administrative determinations are brought to the test of judicial review. In the same way there is no reason to expect that, if the right of the employer to resort to the courts after an award by the Adjustment Board were recognized, the right would be exercised in any sufficient number of cases to increase substantially the business of the courts, even if that possibility were regarded as a valid ground against recognition of the

right, which of course it is not. The reasonable expectation is that it would be exercised only in border-line cases, where the Board's disregard of the contract of the parties appeared to be clear and definite, and only in a sufficient number of cases to serve notice on the Board that if it wished to have its awards voluntarily accepted it must keep sufficiently within the limits of the terms of the contract and of contract law to show some regard for the interests and wishes of both parties to the contract rather than merely for those of the employes.

These considerations supply the answer to the argument that if the employer were allowed an opportunity for judicial relief this would have "undesirable effects * * * upon the Board," and would "seriously interfere with the operations of the Board." Exactly the opposite result might be expected to follow. As a matter of fact, the operations of the Board are now seriously interfered with because of the employers' lack of confidence in the fairness of its awards and because of their belief that the Board pays no proper regard to contract provisions. In consequence, they resist claims as strongly as they can. At the same time the employes are tempted to advance claims that go far beyond anything that would occur to them as reasonable if they understood that the Board was to function within the limits prescribed by the contracts of the parties. As a result, there has been an excessive multiplication of claims, which has clogged the dockets of the Board, especially the docket of the First Division.

There can be no doubt that these conditions, which obstruct the operations of the Board and more particularly of the First Division, would be greatly alleviated if there were more respect for the Board's decisions. A large number of unjustified claims designed to work a silent and surreptitious amendment of contracts without the employer's consent would be eliminated. In other cases the Board, having the confidence of the parties, would be in a better position to aid in working out satisfactory settle-

ments. Both these desirable results might be expected to follow if the Board would from time to time be "enlightened" by a judicial determination of some of the controversies upon which it has acted. Guiding decisions established by the courts in such cases should assist the Board in recognizing the proper limits of its functions so that by remaining within those functions it could build up a respect for its decisions which would lead to fewer and fewer of them being taken into court. Obviously this would promote the efficiency of the Board and would facilitate rather than interfere with its operations.

3. If Congress Had Intended That the Employer Should Be Excluded from Access to Judicial Relief After an Adjustment Board Award, It is Reasonable to Suppose That It Would have so Constituted That Board as to Insure That It Would Act in a Judicial or Quasi-Judicial Manner, and Would not Have so Framed Its Legislation That It is Impossible for the Board Even to Adopt Rules of Fair Procedure.

If, in spite of what has been said above, it should be assumed, solely for the purpose of argument, that Congress did intend to exclude employers from the courts after an award of the Adjustment Board and thereby make such awards final against them, it seems reasonable to suppose that Congress, if it had any such intent, would have so constituted the Board as to insure that it would act in a judicial or quasi-judicial manner. Accordingly, the absence of such intent on the part of Congress may properly be inferred from the fact that it did not do this, but on the contrary so framed its legislation as to leave the Board in a position where, because of its bi-partisan character and because there is no provision for calling in a referee to break deadlocks on the adoption of procedural rules, it is even incapacitated from adopting elementary rules of fair procedure (see p. 49 above).

Of course petitioner does not admit that it would be constitutional to commit the final and conclusive deter-

mination of contract rights to a non-judicial agency, even though such agency were organized along the usual lines of a regular administrative tribunal fully complying with all the standards of quasi-judicial action. But, leaving the constitutional question aside, it seems plain that if the Adjustment Board was in fact intended by Congress to make what would amount to final decisions concerning the interpretation and application of agreements, the Board would have been so constituted as to act at least quasi-judicially. Certainly it cannot reasonably be conceived that Congress, by implication and without an express indication of its intent, designed that one of the parties to a contract should be effectually shut out from a judicial determination of its rights by the action of an agency whose procedure may be entirely appropriate to facilitate voluntary adjustments, but is completely lacking in the very elements of a fair trial. Therefore, it would seem far more consistent with the purpose of Congress to hold that after an Adjustment Board award the employer may have access to the courts than to exclude the employer from such access and thereby enable the action of a completely non-judicial body to determine finally and conclusively the employer's contract rights.

4. There is Nothing to Indicate, as Respondents Tacitly Assume, That Congress Intended to Place the Employer in a Position Where, as a Result of Being Denied Access to the Courts, It Can Be Coerced by Pressure Into Complying with Awards of the Adjustment Board; and the Availability of Judicial Relief to the Employer as well as to the Employes Would not Render the Adjustment Provisions of the Railway Labor Act "Unworkable" Unless it is Assumed at the Outset That the Purpose of the Act is to Make it Possible for the Employes to Coerce the Employer by Pressure into a Waiver of Its Legal Rights.

If it should be decided, as respondents urge, that suits like the present one may not be maintained, and that it

was the intent of Congress that the employer's right to judicial relief lies exclusively through a suit which the employes may or may not choose to bring under Section 3 First (p), this can only mean that Congress must have intended the adjustment procedure of the Railway Labor Act to operate in the following manner: First of all, an employe or a labor organization by filing a claim with the Adjustment Board can create a situation in which the Board will take cognizance of the dispute without the consent of the employer and even though the employer should decline to appear. Then the Board, following its peculiar procedure and asserting its function of "adjusting" the dispute in disregard of the contract of the parties, may make an award allowing the claim and thereby in effect imposing a new contract on the employer, retroactively as well as prospectively, because it regards this result as desirable from the standpoint of some supposed economic "policy." After the Board has so acted, the employer will be prevented from having access to the courts unless the employe chooses to bring suit under Section 3 First (p), which in practice he never does and which he certainly would not do in cases where the award for reasons of alleged policy granted him more than his contract rights. Meanwhile, with this award outstanding against it, and with access to the courts closed in its face, the employer is subjected to the collective pressure and economic bargaining power of the labor organizations to put the award into effect. In this way awards, in the language of the respondents, "find their primary sanction in the collective economic bargaining power of the employees" (R. 103).

Respondents urge that this must be held to be the scheme of "adjustment" intended by Congress and required by the provisions of the Railway Labor Act. They say that the limitation of the employer's opportunity for judicial relief to a proceeding under Section 3 First (p), which rests in the option of the employes and which will

in fact never be brought, "forms an integral part of the Congressional plan" (R. 102), and that to permit the employer to seek judicial relief would "disrupt the process of judicial review contemplated by the statute" (R. 105). They rest this contention upon a "probable intent" on the part of Congress of "making resort to the Courts unattractive to the carriers" (R. 103-104), and amplify this by saying (Respondents' Brief in Supreme Court on original argument, p. 46):

> "* * * the purpose of the framers of the statute was to discourage, insofar as possible, non-compliance with the awards of the Board, and to give them a degree of practical finality which they would not otherwise possess."

The language just quoted can only mean that, if the employer is denied access to the courts otherwise than under Section 3 First (p), it will be placed in a position where to all intents and purposes it will have no choice but to comply with awards of the Adjustment Board, and this of course will give to those awards "a degree of practical finality which they would not otherwise possess." To attribute such an intent to Congress presupposes a Congressional intent to establish a scheme of compulsory adjustment which would effect a complete revolution from the plan embodied in previous Railway Labor Acts. The existence of such an intent on the part of Congress is not supported by anything in the language or legislative history of the present Act. On the contrary, it is at complete variance with the philosophy of that Act, as shown by its history and recognized by this Court in the *Moore* case. As already pointed out (above, p. 67), the House Committee in reporting the Act specifically stated that it did not "introduce any new principles into the existing Railway Labor Act" (House Report No. 1944, 73d Congress, 2d Session, p. 2). Thus the principles of the present Railway Labor Act must be taken to have been the same,

in the understanding of Congress, as the principles embodied in the pre-existing Act of 1926. That Act, like its predecessor, the Transportation Act of 1920, provided for a scheme of purely voluntary adjustment which in no way derogated from the jurisdiction of the courts (*Penna. R. R.* v. *Labor Board,* 261 U. S. 72 (1923), at p. 84). As this Court summarized the history and theory of the legislation, in the *Moore* case (pp. 635-36 of 312 U. S.):

> "* * * neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

To decide now that when an employe has taken a case to the Adjustment Board the employer's right to judicial relief thereafter lies exclusively through a proceeding under Section 3 First (p), which will never be brought, is very definitely to establish a system of compulsion. Respondents admit this themselves, and in fact urge it upon the Court as a ground for adopting their construction of the Act, when they say in the passage quoted above from their brief that the purpose of the Act, as they construe it, is to discourage "non-compliance with the awards of the Board, and to give them a degree of practical finality which they would not otherwise possess." If this is to be the construction and operation of the Act, it amounts to nothing less than the surreptitious establishment, without the knowledge of Congress, of a scheme of compulsory adjustment, novel and unprecedented in character. It would mean the establishment of a system which removes the legal and judicial obstacles that would otherwise stand in the way of the exercise of

coercion, in order to clear the way for the full operation of the "economic bargaining power" of the employes and to make that power effective in enforcing compliance with awards. This is in accord with respondents' theory that the true sanction of such awards is to be found in the collective power of the employes. The purpose of holding that Section 3 First (p) provides an exclusive judicial remedy for the employer is to subject it effectively to that power and close off the escape therefrom which would otherwise be afforded by an opportunity for recourse to a court of law.

Of course an effort is made to disguise the compulsory element in the scheme just described, under color of language which connotes purely voluntary settlement and compromise. It is said that the plan of Congress must be understood to have as "its cardinal principle that the parties should be given every inducement to agree upon a practical settlement of their differences" (R. 102-103), and the thought is unobtrusively suggested that the employer would be less inclined to settle if a way of relief through the courts were open to him. This has a voluntary sound, but it is obvious that the so-called "inducement" to settle which is offered to the employer is simply to corner it in a position where no choice is open to it but to yield to pressure. When respondents speak of inducements to voluntary adjustments, what they have in mind is to compel the employer to submit to a so-called adjustment against its will and then discourage its non-compliance with the resulting award by closing the courts against it while pressure is being applied. This is represented as a purely voluntary process, since it is claimed that the pressure is applied not by operation of law but merely by operation of fact. But it is too plain for argument that the use of the word "voluntary" in any such connection can only be in a Pickwickian sense.

Most of the puzzling anomalies which have been woven about the adjustment procedure of the Railway Labor Act

and which are coming to the surface in this case are due to an attempt to find some sleight-of-hand method whereby informal and voluntary processes, which are perfectly legitimate and unobjectionable so long as they remain voluntary, can be transmuted into involuntary and coercive processes. Respondents' whole argument about the policy of the Railway Labor Act comes down to the contention that, under the cover of words like "adjustment" and "inducement" which carry a voluntary flavor, the policy of the Act should be interpreted as in substance and effect a policy of coercion which would operate by putting the employer in a position where it has no choice but to comply with awards of the Adjustment Board even though they ignore the contract between the parties. If this is the sense in which the intent of Congress and the policy of the Railway Labor Act are properly to be construed, then this Court was wrong when it said in the *Moore* case that the machinery provided by that Act for settling disputes was not based on a philosophy of compulsion, and the House Committee was wrong when it said that the Act of 1934 did not introduce any new principles into the existing Railway Labor Act. What the respondents are asking this Court to do in the case at bar is to read into the Railway Labor Act a novel policy with the most far-reaching implications, which if adopted would strike at the very foundations of legal order, by transferring the settlement of controversies from the operation of law and adjudication to the use of pressure and coercion.

Respondents seek to evade these consequences of their position by asking this Court to close its eyes to facts and content itself with looking at forms. They admit for a brief and decisive moment the coercive quality of the construction for which they are contending when they urge that that construction is necessary in order to give awards a "degree of practical finality which they would not otherwise possess"; but they quickly put away this

realistic portrait and return with a picture-book of forms to which they claim that the court should limit its attention in determining whether "legal coercion" exists. Thus they say in their brief filed in this Court on the original argument (p. 55):

> "We conclude, therefore, that no legal compulsion can become effective against the petitioner as a result of an award of the Adjustment Board until after a full judicial hearing as provided by the Railway Labor Act; that the petitioner will have the opportunity to assert any and all defenses which it may have in such a hearing, and that accordingly, it is not deprived of any legal or constitutional right by being required to await the bringing of a statutory action instead of proceeding itself to seek review by declaratory judgment."

This means that, since Section 3 First (p) formally gives an employer an opportunity to defend itself against a suit under that section, when and if such a suit is brought, this opportunity must be regarded as adequate for the employer and as affording all the protection that it can properly claim, since "legal compulsion" cannot be applied to it save in such a suit. What petitioner is concerned with, however, is not the shadow and form of a "legal compulsion" which will never be applied and has never even been sought to be applied, but with the actuality of a very practical compulsion, the effectiveness of which the respondents themselves have insisted upon when they say that it gives to awards a degree of practical finality which they would not otherwise possess.

Of this actual and practical compulsion respondents say that this Court may take no notice and is not entitled to take notice, because such compulsion is something that is "extra-legal."* For the same reason, apparently,

*The fact that this practical compulsion is not "extra-legal" but is in reality a "legal compulsion," because made possible by virtue of the provisions of the Railway Labor Act, is shown below, at pp. 244-49.

the Court is also not to take notice of the fact that suits are never actually brought under Section 3 First (p), because that likewise is "extra-legal," although it is a fact reported and commented on in every published account of the Adjustment Board. Respondents seem clearly conscious that the success of the contentions which they are here defending depends upon keeping facts out of the case and making the case turn on a manipulation of legal patterns. Thus they say in their original brief in this Court (p. 53):

> "* * * petitioner asserts that it is under certain elements of extra-legal pressure which virtually compel it to comply with the awards of the Board without such a [judicial] hearing. It contends that this consideration should induce the court to rule in its favor."

And again (*ibid.*, p. 55):

> "Even, however, if the petitioner were able to establish that the situations of which it complains were truly burdensome and truly beyond its control, it would not thereby have advanced its case. The courts are not concerned with extra-legal reasons why a party may not desire to submit his rights to a special method of adjudication. If the road to the courts is open as a matter of law, the judiciary cannot be expected to clear it of all practical obstacles which may render travel difficult. The removal of such obstacles is a matter of legislative and not judicial consideration."

Translated into plain language and concrete terms, this can only mean that, if on the face of a statute there is an appearance of an opportunity for judicial protection, the courts may not look further because whether or not the opportunity actually exists and can be availed of is an "extra-legal" question. It means that, if a party

complains of a particular form of proceeding as insufficient because he does not have it in his power to bring that form of proceeding and those who have the power refuse to do so, this simply shows a lack of desire on his part, for extra-legal reasons, to submit his rights to that particular method of adjudication, and that such extra-legal reasons are not for the consideration of the courts. It means that, if judicial relief is available on paper but not in fact, the courts must not take this into account in determining whether to rule out by construction and implication, as this Court is asked to do here, another form of relief that would be available and effective, because it is said that to do so would be clearing "practical obstacles" out of the way and thus trenching on legislative prerogatives. The statement of these contentions may be permitted to stand as their sufficient refutation. The patently insincere formalism of such reasoning is not in accord with a properly serious and responsible approach to the determination of the issues here involved.

No less hollow is the purportedly practical argument advanced elsewhere by the respondents that the employer is shown not to need any right of access to the courts after an award, because the adjustment system is already working successfully and satisfactorily as shown by the absence of strikes in the railroad industry (Defendants' Memorandum Brief in District Court, p. 44; R. 110). The fact that there have been no strikes in the railroad industry in recent years is susceptible of more than one interpretation. It may indicate no more than that the threat to strike is so powerful a weapon that opposition yields before it. If this is so—as in fact it is—it serves to emphasize the danger of so construing the Railway Labor Act as to make awards find their "primary sanction in the collective economic power of the employes." This is only another way of saying that the Act should be so construed as to make strike threats the usual method for enforcing claims. If, as respondents contend, such a con-

struction of the Act should be adopted, it would obviously place the employer in a position where it would be under the continual coercion of such threats, and its rights under its contracts with its employes would be only what the employes would permit them to be. Clearly such a construction would place a premium upon the exertion of force and compulsion, and would disregard adjudication as an instrument of social order.

5. The Purpose and Intent of the Adjustment Provisions of the Railway Labor Act Can Be Fully Achieved Without Assuming That That Act Embodies a Coercive Process of Compulsory Adjustment, and Therefore the Act Ought not to be Given by Implication a Construction Which Would Produce an Oppressive and Arbitrary Result not Required by its Terms or by the Intent of Congress.

Respondents contend that, unless Adjustment Board awards are to be given the "practical finality" against the employer which comes from denying to the employer subsequent access to the courts, the adjustment procedure will become futile and without value, and it is said that an award would be an "absolute nullity" (R. 109) if the employer could immediately invoke the jurisdiction of the courts to retry the whole controversy. Respondents were successful in impressing this view on the majority of the Court of Appeals below, which said in its opinion (p. 242 of 124 F. (2d); R. 336):

> "If a carrier can * * * [circumvent] the employee's rights [to bring a suit under Section 3 First (p), and presumably to refrain from bringing such a suit] by judicial proceedings * * * the Railway Labor Act will have become, finally, a dead letter. The Board's awards would amount to nothing more than innocuous advice to the disputants, like that provided for under the Railway Labor Act of 1920, or mere

proposals for a new agreement, having not even the force of an offer in the law of contracts. If that is the result of the Act and of an award, Congress went to much ado about nothing. The chief effect of the legislation would be to create much complicated machinery, capable of producing only delay and confusion in settlement of disputes which it was the avowed object of the Act to end with expeditious decision. We do not believe that Congress intended any such consequences."

Whether the view thus expressed is sound, and whether or not it would be proper to say that an award would necessarily be futile and amount to nothing but "innocuous advice" if an employer could in the face of it apply to a court for a determination of its rights, depends wholly on the view which is taken of the nature of an award and of the function it is intended to perform under the scheme of the Railway Labor Act.

The view expressed by the majority below might conceivably be sound if an award were properly to be regarded as a compulsory order determinative of the parties' rights, although of course even such an order ought to be subject to substantial and not merely illusory review. Nevertheless, if the award is an order in the true sense, it might well be argued that any form of review which involves a complete trial *de novo* on the law and the facts operates to destroy the effectiveness of the order by reducing it to mere advice. That was the objection to the form of review originally provided for orders of the Interstate Commerce Commission, and a court might properly refuse to allow a proceeding which involved a review of that character *if adequate judicial relief of a different kind were available.*

The relevance of this discussion rests, however, as above pointed out, on the assumption that an Adjustment Board award is in fact an order carrying with it an obligation of obedience, with which obligation the courts

should not unnecessarily interfere. Is an award to be properly regarded as such an order under the true construction of the Railway Labor Act? Is it true under a proper construction of that Act that an award would be futile and amount to nothing even if it did merely constitute advice to the parties?

In the first place, it may be noted that if an Adjustment Board award is intended by the Railway Labor Act to be an order carrying an obligation of obedience, certain features of the adjustment scheme as established under that Act and certain provisions of the Act itself become difficult to understand. It is plain, for example, that the adjustment procedure as organized and administered, and as understood by those who are administering it, contemplates, not an adjudication of the rights of the parties under their contracts, but an adjustment of their relations, in the supposed interest of policy, which may involve a disregard of those rights. This is shown by the projection of the so-called conference method into the adjustment procedure—which is carried on in the first instance by a bi-partisan board created apparently for the express purpose that settlements may be arranged. It is further shown by the action of the referees, who adopt and promulgate in their awards settlements which do not necessarily conform to the terms of the contracts but may be based upon alleged principles of policy which, in respondents' language, will enable the parties in the future "to conduct the business of interstate commerce without friction, and without interruption" (R. 133).

Now if an award promulgated by this method and on these principles is to be regarded as an order carrying an obligation of obedience and which ought not to be fully examined by the courts because such re-examination would interfere with its effectiveness, then the highly unusual result would follow that a party to a contract would be placed in a position where the courts would step out of the way in order that he might have no recourse but to obey a determination based on supposed

policy in disregard and derogation of his contract rights. He would be placed in a position where he would have no choice but to be deprived of those rights as a result of the wholly non-judicial proceedings before the Board. Clearly, this was not the purpose or intent of Congress in enacting the Railway Labor Act.

Section 3 First (p) of the Act, even though not used in practice, nevertheless indicates plainly that Congress did not intend that the employer should be under an obligation to obey awards of the Board as such. This section, as already pointed out and as admitted by the respondents (pp. 27-30 above), does not contemplate an enforcement of the award as such, but provides instead that the suit is to be brought on the plaintiff's original contract claim, the award being merely evidentiary with respect to any findings of fact that it may contain. This is precisely what might be expected if the award was not regarded by Congress in the light of a mandatory order; and, on the other hand, it is impossible to reconcile with an intent that the award is to be obeyed as such. What the parties must obey is their duty under their contract, and accordingly provision for the enforcement of that duty, with the evidentiary aid of an award, is duly made in Section 3 First (p). Thus an award cannot properly be regarded as an order which the Act calls upon the parties to comply with against their will. In so far as it reproduces contract obligations, those obligations must of course be fulfilled, and as such they are enforceable, with the evidentiary aid of the award, in the statutory suit; but the award itself embodies no requirement of involuntary obedience.

From all that has been said above there finally emerges a consistent and intelligible picture of the nature and character of an award, of the purpose of the adjustment procedure, and of the place which awards are intended to occupy in the scheme of that procedure. They are not made enforceable and they carry no obligation of involun-

tary obedience, and accordingly they may embody settlements and solutions which may deviate from the parties' rights. Congress conceived that there might be advantage in providing a mechanism of mediation through which settlements could be formulated that might deviate from those rights, and which could formulate and propose such settlements under circumstances which might give rise to the hope that they would prove mutually acceptable. This is what it did in establishing a bi-partisan Adjustment Board and in so restricting the enforceability of the awards of that Board as to leave the Board free to formulate awards that might not exactly coincide with legal rights. Awards of the Board are given an essentially voluntary character, and they may, if it seems desirable, formulate settlements which could not fairly or justly be imposed on unwilling parties. If the adjustment procedure is conceived in this way, and only if it is conceived in this way, is it possible to reconcile the various adjustment provisions of the Railway Labor Act; and only if the adjustment procedure is conceived in this way does it conform to the description given by this Court in the *Moore* case, of "a system for peaceful adjustment and mediation voluntary in nature." Likewise, it is only if conceived in such a way that the adjustment procedure and the function of the Adjustment Board under the Railway Labor Act conform to the recent statement of Mr. Justice Jackson, speaking for this Court, in *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen, supra* (see pp. 43-44 above), that "The Mediation Board and Adjustment Board *act to compose differences* that threaten continuity of work" (Emphasis supplied). Neither of the descriptions in those cases would fit a conception of an Adjustment Board award as an order requiring involuntary obedience.

If the picture of the adjustment procedure just given represents correctly, as it appears to do, the plan and intent of the statute, what becomes of the objection which impressed the court below that a construction of the Act

would be inadmissible which deprived an award of the quality of command and reduced it to mere "innocuous advice"? The answer is that under the scheme of the Railway Labor Act an award has no quality of command and was not intended to have such quality since the system is one "for peaceful adjustment and mediation voluntary in nature." Accordingly it must be recognized as true that in a sense awards under the Act never are and never can be more than "advice," and the Act recognizes this by denying to them as awards the quality of enforceability. But this does not mean that it is proper to characterize them as "innocuous advice" or to say that an award is an "absolute nullity." These characterizations display a failure to understand the philosophy of mediation and adjustment which it was clearly the purpose and intent of the Railway Labor Act to embody. They assume that there is no middle ground between compulsion on the one hand and ineffectiveness or nullity on the other. This middle ground is precisely the field in which mediation and adjustment operate, and if no such ground exists the adjustment provisions of the Railway Labor Act are but a wilful deception.

The philosophy of mediation and adjustment proceeds on the assumption that, when parties become involved in a controversy respecting their rights, it is possible that a solution may be found which, without giving full effect to the rights of either, may prove acceptable to both. Frequently the parties themselves are not able to find such a solution by direct negotiation between themselves. In such cases experience has shown that if representatives of the parties can be brought together, they may develop the requisite ingenuity to devise a solution which they can persuade their principals to accept. Standing more or less apart from the controversy and often having a broader and more tolerant view of the issues, they can be expected to occupy a better position to formulate a variety of possible solutions than the disputants them-

selves. It is not, however, always possible for partisan representatives to accomplish the desired result. They may share the limitations of their principals and so be unable to devise a solution, or they may not carry enough weight or have enough influence with their principals to persuade the latter to accept the solution which they propose. Accordingly there has been developed, as a usual incident of the process of mediation and adjustment, a further stage which consists of calling in an outside neutral when the representatives of the parties have found themselves unable to accomplish results. Such a neutral mediator or referee, because of his outside position, is sometimes more successful than the parties' own representatives in obtaining an over-all view of the situation and in understanding the interests and needs of both sides. He can, therefore, devise a more satisfactory solution, while his disinterested position and the confidence which it inspires in both sides may lead them to accept more readily the solution which he proposes.

The system of mediation and adjustment thus outlined has become a well recognized mechanism in the field of labor relations generally, and it is obviously the system which has been adopted and incorporated in the Railway Labor Act. There is a detailed correspondence between the adjustment provisions of that Act and the system above described in each of its stages—first, the negotiations between the parties, then the attempted adjustment between the partisan representatives of the employers and the employes on the Adjustment Board, and, finally, the formulation of an award by the referee.

It is to be noted that the entire force and effect of the procedure of mediation and adjustment derives from, and is concentrated on, the attempt to bring about voluntary acceptance of the process and its results by the parties. Voluntary acceptance is the essence of the procedure and dictates its various stages and the means through which it operates. The initial negotiations be-

tween the parties, the conferences between their representatives, and the employment of a neutral referee would not be required and would have no significance or meaning save for the voluntary character of the procedure. It contains no element of compulsion or force, and the introduction of a compulsory element would be inconsistent with its methods and purpose, for two reasons. In the first place, it would render the whole cumbrous process of conference and mediation superfluous. In the second place, it would defeat the purpose and intent of the adjustment procedure, which is to bring the parties to a settlement that may involve their giving up existing rights which they have lawfully acquired, in exchange for prospective future advantages. Of course the parties can do this voluntarily if they are brought to see the advantages with sufficient clarity, but it is inconsistent with the nature and theory of the adjustment process, and with the fundamental principles of our system of law, that they should be compelled to do so involuntarily and submit to have new contracts made for them which they are unwilling to accept.

It is accordingly plain, as this Court recognized in the *Moore* case, that the system of adjustment established by the Railway Labor Act is essentially voluntary in character. This does not mean, however, that awards of the Adjustment Board and its referees can properly be characterized as mere nullities because they lack the quality of compulsory orders, or that their status and value are to be minimized by referring to them as nothing but "innocuous advice." The adjustment procedure, as above described, depends upon recognizing that there is an intermediate ground between compulsion on the one hand and mere advice on the other. The solutions formulated by the representatives of the parties or by the neutral referees, while not compulsory in the sense of requiring obedience, are supposed to have, and do in fact have, an influential character which operates through

psychological processes such as persuasion, confidence and respect rather than through compulsion. If this were not so, the procedure of mediation and adjustment would never have been developed. It would be a mere useless pretense and sham. At the same time, the introduction of a coercive element into the procedure immediately destroys its effectiveness. That effectiveness consists precisely in such things as confidence, respect, willingness to consider and accept proposed solutions, which are the things that lend authoritativeness to the mediator's suggestions, and which vanish at the breath of force.

Undoubtedly much of the sorry confusion, misunderstanding and controversy which has surrounded the National Railroad Adjustment Board, and has resulted in the present suit, is due to an effort to read a philosophy of compulsion into the adjustment provisions of the Railway Labor Act and to assume, as did the majority of the Court of Appeals below, that the awards of the Board, although they may involve deviations from the parties' contract rights, are nevertheless to be regarded as having a coercive effect going beyond that to which they are entitled under Section 3 First (p) of the Act. This view seems to rest in part, as shown by the passage quoted from the majority's opinion (pp. 156-57 above), on the fact that the adjustment procedure in the railroad industry has been established by statute. Doubtless a statute is generally thought of as involving an element of command, and the majority below seem to have assumed that Congress would not have legislated if it had not intended that a quality of command should adhere to Adjustment Board awards. No such consequence necessarily follows. A statute may establish a voluntary system of adjustment, no less than a compulsory system of command. The majority below, in the passage quoted, apparently thought that Congress could have had no other reason for enacting the Railway Labor Act of 1934 than to provide means for insuring obedience to awards. As a matter

of fact, the history of the Act shows that the reason was an altogether different one. It shows that what Congress was concerned with was not the question of making Adjustment Board awards compulsory, but was primarily the question of whether or not there should be an Adjustment Board whose services would be available to the employes of all the railroads of the country. The Act of 1926 left the establishment of Adjustment Boards to voluntary agreement, and as a result the Boards which were set up did not provide a complete coverage for all railroads. Also, the earlier Act contained no provision for the appointment of a referee when a Board deadlocked. It was to remedy these two situations that the Act of 1934 was passed, as explained in an earlier section of this brief (pp. 67-68 above). This was the reason for the legislation, with its establishment of what the majority below call "much complicated machinery." So far as relates to the compulsory character of awards, Congress expressed its intention with sufficient clarity by the insertion of Section 3 First (p) in the amended Act. As already pointed out, the unmistakable purpose and intent of that section was to recognize expressly that awards are not enforceable as such, and that the employer is under no obligation of obedience to an award. This is made abundantly clear by the provisions of the Act as discussed above (pp. 157-60). It is probably for this reason among others, as already suggested, that the employes have steadfastly declined to conform to the Congressional plan for enforcement, and it is their refusal to do so which is largely responsible for the condition of confusion and uncertainty with respect to awards which has culminated in the present litigation.

The position of the respondents in the case at bar rests upon a view of the adjustment procedure which combines two fundamentally inconsistent elements, the element of voluntary settlement and the element of compulsory

obedience. Necessarily they must accept the voluntary view in order to justify the action of the Board in proceeding non-judicially and making awards which disregard the contract rights of the parties. These aspects of the Board's activity can only be justified if its function is to stimulate, promote and facilitate voluntary settlements. Along with this voluntary conception of the adjustment procedure respondents wish, however, to combine a theory of compulsion. As noted above, they seek by sleight-of-hand to transmute informal and voluntary processes, which are perfectly legitimate and unobjectionable so long as they remain voluntary, into involuntary and coercive processes. They insist that the Act must be so interpreted as to provide a way whereby the employer can be "induced" to obey an adverse award, and that for this purpose the Act must be construed as denying it a right of access to the courts. Fundamentally, the only argument which the respondents have against petitioner's right to maintain this suit is that if it had such a right it would not be subject to sufficiently effective inducements to comply with awards of the Board. To produce compliance by "inducements" of this character is to compel compliance. A system of adjustment does not operate through voluntary methods when it places one of the parties in a position where for the purpose of "inducing" compliance he is deliberately exposed to pressure, while the opportunity of escape through judicial relief is denied to him. This is the scheme of adjustment procedure which the respondents are asking this Court to accept. Petitioner submits that that procedure was not intended by Congress to operate in this way and cannot lawfully be permitted to operate thus, at least so long as the Adjustment Board does not act judicially and does not confine itself to a proper judicial determination of the parties' contract rights.

6. If the Principles Advanced by Petitioner Herein Should be Thought to Require That an Employe Whose Claim Has Been Denied by the Adjustment Board Should be Allowed Recourse to the Courts for a Judicial Determination of His Legal Rights, Such a Result Does not Constitute a Refutation of Those Principles, But on the Contrary Leads to the Conclusion that Such an Employe Should be Permitted Such Recourse, and the Railway Labor Act Properly Construed Does not Prevent that Result.

All the reasons which have been advanced in this brief to show that an employer against whom an award has been rendered by the Adjustment Board should be entitled to have access to the courts are equally applicable to show that an employe against whom an award has been rendered is entitled to the same right. It would be improper to hold that an employe whose claim has been rejected by the Board may not pursue his legal rights judicially on the ground that the Act must be construed as precluding access to the courts in any form after a Board award except through a proceeding under Section 3 First (p), because, as demonstrated above, such a construction is not required by the Act, and is not permissible if the proper theory of the adjustment procedure is to be maintained. Accordingly, if there is no ground for holding that Section 3 First (p) provides the exclusive channel for judicial relief after an award of the Board, then such a construction of Section 3 First (p) cannot be invoked to support a holding that an employe whose claim has been rejected by the Board may not, if he so desires, proceed in court by an action for damages, bill for injunction or application for a declaratory judgment for a judicial determination with respect to his claim.

This view was in fact expressly adopted in *Stephenson* v. *N. O. & N. E. R. Co.*, 180 Miss. 147, 177 So. 509 (1937). In that case, a consolidation, for operating purposes, of the defendant railroad and another railroad, both of which had previously been operated as separate divisions of the

Southern Railway System, had been made, and a dispute arose with respect to the seniority of the train dispatchers involved in the consolidation. The dispute was taken to the National Railroad Adjustment Board, which made an award in favor of a consolidated seniority roster. Certain of the train dispatchers, who had been represented at the hearing before the Board and who claimed that their seniority rights were impaired by the Board's award, brought suit in the state courts to enjoin the defendant railroad from violating their seniority rights. The Supreme Court of Mississippi reversed the lower court's decree of dismissal and entered an injunction for the plaintiffs, resting its decision primarily on the ground that the dispute, though in form between the carrier and certain of its employes, was in substance and reality a dispute between two groups of employes and was therefore not the type of dispute of which the Adjustment Board was intended by Congress to take cognizance. However, the court then went on to say (pp. 177-79 of 180 Miss., 518-19 of 177 So.):

> "Answering the contention of the appellee carrier to the effect that it must obey the terms of the award of the Adjustment Board by pooling its seniority lists of train dispatchers with that of another separate and distinct railroad in violation of the property rights of its own employees, it should be observed that under the Railway Labor Act of 1934, the award of the Adjustment Board is not a self-executing order. * * * Neither the carrier nor the employee against whose interest an award has been made is given any right under the Act to go into the United States District Court as a party plaintiff or claimant. *Then, most assuredly the employees of a carrier against whose interest and seniority rights an award has been made are not left without remedy in all of the courts of the land.* * * * *Hence, such an employee who has lost his cause before the Adjustment Board must necessarily*

resort to a state court of competent jurisdiction, or lose the property rights involved in a seniority contract with his employer.'' (Emphasis supplied.)

Thus, the court expressly states that, in a case where an employe has lost his claim before the Adjustment Board, although such employe is without standing to sue in the Federal courts in the absence of some recognized ground of Federal jurisdiction, since the Railway Labor Act confers no general jurisdiction on the Federal courts with respect to labor disputes but only jurisdiction to entertain a suit under Section 3 First (p), nevertheless such employe still has available the usual remedies in the state courts, as courts of general jurisdiction, to protect his contract and other legal rights, and the fact that his claim has been rejected by the Adjustment Board does not bar his resort to the general jurisdiction of the state courts to invoke those remedies.*

*To like effect are the decisions in *Lane* v. *Union Terminal Co.*, 12 F. Supp. 204 (N. D. Tex., 1935) and *McDermott* v. *N. Y. Cent. R. Co.*, 32 F. Supp. 873 (S. D. N. Y., 1940). In the *Lane* case, an employe whose displacement from his position as gateman had been directed by the Adjustment Board had sought and obtained in the state court an injunction restraining the Terminal Company from displacing him in compliance with the award of the Board. Thereafter, the injunction in the state court was apparently modified to permit the issues to be considered in a Federal court, in the light of the Railway Labor Act, and a bill in equity was accordingly brought, seeking the same relief as was sought in the state court. The Federal District Court, however, decided that, in view of the provisions of Section 3 First (p) of the Railway Labor Act to the effect that suit under that section may be brought by the "petitioner, or any person for whose benefit such order was made," the jurisdiction of the Federal courts under that Act did not extend to suits brought by persons whose claims had been denied by the Adjustment Board, and, since there was no other ground of Federal jurisdiction in the case, the plaintiff was left to his remedy in the state courts.

Likewise, in the *McDermott* case, the Federal District Court, holding that it was without jurisdiction where the plaintiff's claim had been rejected by the Adjustment Board, said (p. 874 of 32 F. Supp.):

> "The plaintiff is not without remedy for breach of contract but he cannot maintain his action in this court."

In other words, the sense of these cases is that, although a claimant employe who has lost before the Adjustment Board cannot thereafter seek relief in a Section 3 First (p) proceeding, which is provided only for the benefit of claimants whose claims are sustained by the Board, nevertheless such a defeated claimant is not barred from the remedies which he would have in a court of general jurisdiction and which were available to him before he went to the Board.

Of course, another reason might be advanced for holding that an employe who had voluntarily submitted his claim to the Adjustment Board and had been rejected by it was thereafter barred from submitting the same claim to the courts. It might be contended that in such a case the employe, having voluntarily elected to pursue the administrative remedy and seek relief before the Adjustment Board, was thereafter precluded, on principles of estoppel under the so-called doctrine of election of remedies, from changing to another type of remedy. This has in fact been suggested in some cases as a reason for dismissing a suit brought by the employe under such circumstances (see discussion at pp. 223-27 below). Petitioner believes that such reasoning is unsound and that the mere fact of the employe having elected to pursue the administrative remedy does not constitute a true basis for the application of the principle of estoppel.* The sounder view, petitioner submits, is that reflected in the opinion in the *Stephenson* case, *supra*.

* The so-called doctrine of election of remedies has its foundation in principles of estoppel, and should therefore be applied only where there is a voluntary choice or election of one of several inconsistent remedies, under circumstances in which a subsequent change from the voluntarily elected remedy to another remedy would infringe upon rights which arose as the result of the choice of the prior remedy. See, for example, *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 43 S. Ct. 100 (1922), where this Court said (p. 295 of 260 U. S.):

> "Any decisive action by a party, with knowledge of his rights and of the facts, determines his *election* in the case of *inconsistent remedies*, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these *inconsistent conclusions*." (Emphasis supplied.)

This doctrine has no application where, as in the present case, there is no such choice of one remedy giving rise to rights which would be infringed by a subsequent change to another and inconsistent remedy. This was pointed out in *McFadden Securities Co.* v. *Stoneleigh Garage*, 55 F. (2d) 1025 (App. D. C., 1932). There a suit upon a lien on cars which the plaintiff had sold to the defendant was held by the District Court to be barred because the plaintiff had previously intervened in an equity receivership proceeding to secure payment for the cars out of funds in the hands of the receiver. The ground of the holding was that the intervention in the receivership proceeding constituted an election of remedies which barred the plaintiff from pro-

However, even if it were tenable to hold that an employe whose claim had been voluntarily submitted to and rejected by the Adjustment Board was therefore estopped by his own act to change to another type of remedy, such a holding would have no bearing upon the present case. Here, for the reasons set forth in Section II of this brief (pp. 82-92 above), petitioner had no choice but to appear before the Adjustment Board and defend itself as best it could against the unilateral submission by the employes of the dispute to the Board, and accordingly in no sense was there any voluntary choice or election by petitioner of the adjustment procedure as the preferred remedy. The doctrine of estoppel or of election of remedies necessarily presupposes a voluntary choice or election,* and it can

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ceeding directly against the goods sold. The Court of Appeals reversed the District Court's action, saying:

> *"The doctrine of election, where it applies at all, applies only to a case where one assumes an inconsistent position,* or where, through his action, other rights have arisen *as to which he should be estopped to take a contrary position.* It is never applicable where, as here, a creditor has a right to pursue more than one remedy." (Emphasis supplied.)

To the same effect is *United States* v. *Ickes*, 73 F. (2d) 844 (App. D. C., 1934).

In the present case there is no inconsistency between the remedies in question and no prejudice to the rights of the other party, on which an estoppel can be founded, is created with respect to either party as a result of the other party's resorting to the courts following submission of the dispute to the Adjustment Board. See discussion at p. 191 below.

In fact, the doctrine of election of remedies is one which today has very limited and infrequent application, and modern courts appear to be viewing the doctrine with an increasing amount of suspicion and to be severely restricting its scope and application. See, for example, *Friederichsen* v. *Renard*, 247 U. S. 207, 211, 213, 38 S. Ct. 450 (1918); *Oil Well Supply Co.* v. *First Nat. Bank of Winfield, Kan.*, 106 F. (2d) 399 (C. C. A. 10th, 1939).

* Thus, this Court said in *Wm. W. Bierce, L'd*, v. *Hutchins*, 205 U. S. 340, 27 S. Ct. 524 (1907) (p. 346 of 205 U. S.):

> "Election is simply what its name imports. A *choice* shown by an overt act, between two *inconsistent* rights, either of which may be *asserted at the will of the chooser alone.*" (Emphasis supplied.)

Likewise, in *Pittsburgh Terminal Coal Corporation* v. *Bennett*, 73 F. (2d) 387 (C. C. A. 3rd, 1934), it was said (p. 389):

> "Election involves a *choice*, and choice presupposes a knowledge of alternatives *and freedom and opportunity to choose between them.*" (Emphasis supplied.)

have no application where there has been no such choice or election.

Accordingly, even if an employe who had voluntarily submitted his claim to the Adjustment Board and had been rejected by that Board should be held barred from thereafter submitting the same claim to the courts, on the ground that he was bound by his election of the adjustment procedure as his preferred remedy, nevertheless that ground would have no application to bar petitioner in the present case, because there has been no choice or election by petitioner of the adjustment procedure as its preferred remedy.*

D. Preservation of the Advantages Given to the Employes in Suits Brought Under Section 3 First (p) of the Act Does Not Require that the Act Should Be Construed So As to Produce the Arbitrary and Oppressive Results Which Would Follow from Denying the Employer Access to the Courts On Its Own Initiative After an Award of the Board.

It has been shown above that there is no basis for inferring any "policy" in the Railway Labor Act which would require that after a controversy has been submitted to the Adjustment Board the employer shall thereafter be denied access to the courts save in a proceeding brought by the employe under Section 3 First (p). There remains to be considered the contention of respondents that the judicial remedy through Section 3 First (p) must be held to be exclusive for another reason, namely, to preserve to the employes certain procedural advantages which they are permitted to enjoy in a suit brought under that section of the statute.

The terms of Section 3 First (p) are sufficient proof of an intent on the part of Congress to offer to employes an advantageous and attractive form of procedure with

* For further discussion of this point, see below at pp. 188-91 and 227.

respect to matters of venue, costs and attorney's fees. If this had not been the Congressional intent, obviously no such form of statutory suit with these features would have been provided. To be sure, the benefit thus intended to be conferred on the employes appears to be quite unappreciated, since, in accordance with the settled policies of their labor organizations, they never avail themselves of the advantages held out to them under the section. However, the Congressional intent seems plain, and the question therefore arises as to what inference, if any, is to be drawn therefrom with respect to whether or not Section 3 First (p) must be construed as providing the exclusive judicial remedy available to the employer after an award of the Adjustment Board.

On ordinary principles of reasoning it would not seem to follow that, because an unusually attractive remedy has been offered to one of the parties to a controversy, the other party must for that reason be presumed to have been deprived of any right to proceed at all. On the contrary, the proper conclusion would seem to be that the reason for making a particular form of procedure attractive to one party is to encourage that party to take the initiative—an encouragement which would not be necessary if the other party had no power whatever to proceed. If the employer could not proceed at all, it would seem futile and superfluous to influence the employe to proceed by holding out special advantages.

As a matter of fact, the explanation for the enactment of Section 3 First (p) is almost certainly an even simpler one. As has been pointed out above, a suit brought under Section 3 First (p) is brought not on the award of the Adjustment Board but on the original contract between the parties. Now before the enactment of Section 3 First (p) there was no jurisdiction in the Federal courts to entertain a suit based on simple contract rights in the absence of diversity of citizenship between the parties. Accordingly, the suit had to be brought in a state court.

Obviously, the principal purpose of Section 3 First (p) was to cure this defect and enable such suits to be maintained in the Federal jurisdiction, with the evidentiary aid of the Board's award. This was pointed out by the Circuit Court of Appeals for the Seventh Circuit in *Nord* v. *Griffin, supra,* where the court said (p. 484 of 86 F. (2d)):

> "The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied."

The only possible ground for treating the advantages offered to the employe in a proceeding under Section 3 First (p) as an indication of Congressional intent that no other suit should be permitted would be a showing that if such other suit would lie it would necessarily deprive the employe of those advantages. This argument, of course, assumes that Congress intended the employe to enjoy the advantages absolutely, whereas the most that can be inferred from the statute is that Congress intended him to enjoy them only in the contingency that he actually exercised his choice to sue under Section 3 First (p). If he does not elect to do so, it is not necessary to suppose that Congress intended to protect him with respect to advantages which he does not value highly enough to warrant his availing himself of them. This seems a sufficient answer to the whole argument.

However, it is clear in any event that there must be at least a showing that such a suit as petitioner is here seeking to maintain would impair the advantages which the employes would enjoy under Section 3 First (p) before it can be contended, rightly or wrongly, that the employer must necessarily be denied the right to bring such a suit in order to protect the employes in the enjoyment of their advantages under Section 3 First (p). Respondents' argument neglects the need for such a showing. It pro-

ceeds on the bare assumption that, unless a proceeding under Section 3 First (p) is held to afford the exclusive opportunity for access to the courts after an Adjustment Board award, the employes will necessarily be completely deprived of the advantages that Congress intended them to have under that section.

To this view respondents were successful in bringing a majority of the Court of Appeals below, which said in its opinion (p. 240 of 124 F. (2d); R. 334):

> "Congress intended these advantages to mean something. They mean nothing if such a suit as this can be maintained."

And again (p. 241 of 124 F. (2d); R. 335):

> "All these advantages the statute makes incident to the enforcement suit. They cannot be had in any other. We have no power to grant them in this one. Yet the argument that it can be maintained brushes them aside, as if they were mere matters of procedure, not affecting the substance of decision or right. With that we cannot agree."

This language of the court below assumes that the mere institution of a suit like the present one, if it should be held that such a suit can be maintained, would operate to bar the employes from bringing suit under Section 3 First (p) and thereby obtaining such advantages as are made available to them in a suit of that character. However, it is clear that such a suit could still be instituted on behalf of the employes and prosecuted to judgment if they so elected, notwithstanding the prior institution of a declaratory judgment suit like this one, and therefore the maintenance of the present suit would in no way operate to deprive the employes of the benefits sought to be conferred on them by Section 3 First (p).

There are only two ways in which the prior institution of a declaratory judgment proceeding could conceivably interfere with a subsequent suit by the employes under Section 3 First (p), but in neither of these ways would the declaratory judgment proceeding have such an effect:

1. The existence of the previously instituted declaratory judgment suit might conceivably be regarded as constituting a bar to the second suit so as to cause the court having jurisdiction of the second suit to abate that suit pending final determination of the prior suit; but the decided cases have held otherwise.

2. The court having jurisdiction of the first suit might proceed in such a manner—*e. g.*, by enjoining the parties from prosecuting the second suit or by pressing its own suit to judgment—as to nullify the practical effectiveness of the second suit; but, again, this possibility is eliminated under established principles.

Under the decided cases it is clear that a suit begun by an employe or employes under the provisions of Section 3 First (p) of the Railway Labor Act to make effective rights declared in an award of the Adjustment Board, after the institution by the carrier of a proceeding for a declaratory judgment, as in the present case, would in no way be barred or interfered with by the institution of the prior declaratory judgment suit.

1. A Proceeding Such as the Present One Would Not Bar a Suit Subsequently Brought by the Employes Under the Provisions of Section 3 First (p) of the Railway Labor Act.

It is well established by the cases that the fact that one court has assumed jurisdiction of a particular cause of action does not preclude another court—and *a fortiori* does not preclude the same court—from entertaining a

suit involving the same subject matter, except in the case of actions *in rem* or *quasi in rem*. This rule is set forth and is discussed at length in the decision of this Court in *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 43 S. Ct. 79 (1922). In that case the construction company brought an action for breach of contract in a Federal court, the ground of jurisdiction being diversity of citizenship. Thereafter the defendants in that action instituted a suit in equity against the construction company in a State court, seeking an accounting and judgment under the contract. The construction company then sought in the Federal court to enjoin further prosecution of the equity suit subsequently brought in the State court. The Supreme Court, in holding that such an injunction was properly refused by the District Court, pointed out that the injunction would have been proper to preserve the jurisdiction of the prior court over the *res* of the suit if there had been such a *res*, and then went on to say (p. 230 of 260 U. S.):

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. * * * *The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.*" (Emphasis supplied.)

This principle has been directly applied to a situation closely analogous to the present one, in *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28 (C. C. A. 8th, 1939).

There an insurance company instituted proceedings in a Federal court for a declaratory judgment of its rights and liabilities under certain insurance policies. In its petition the company included a request that the defendants, beneficiaries under the policies, be enjoined from prosecuting in any other court an action on any of the policies in question during the pendency of the declaratory judgment proceeding. On appeal from a decree dismissing the bill, the Circuit Court of Appeals held, first, relying on *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 46 (1937),* that the case was a proper one for the exercise of declaratory judgment jurisdiction, and second, relying on *Kline* v. *Burke Constr. Co., supra*, that the insurance company had no right to an injunction against the prosecution of suits by the beneficiaries in other courts. The court said (pp. 31-32 of 102 F. (2d)):

> "Where one court takes jurisdiction of an action *in personam* seeking a judgment for money only, it does not affect the right or the duty of another court to try and adjudicate the same cause of action. *Kline* v. *Burke Construction Company*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. The fact that the declaratory judgment law has given the alleged debtor the right to initiate the action to adjudicate the dispute over the contract for the payment of money only, does not call for the application of any different rule. *The beneficiaries under these policies may maintain actions at law on the policies for recovery of money only, notwithstanding the pendency of the company's suit to have it declared that the*

* In the *Aetna* case this Court held that the advantages which accompany the right of a beneficiary under an insurance policy to bring suit against the insurer in order to enforce the policy do not defeat the right of the insurer to institute a proceeding for a declaratory judgment to determine an existing controversy with respect to the policy, in the absence of an actual suit by the beneficiary on the policy.

company is not indebted on account of the same policies." (Emphasis supplied.)*

In the same manner, the respondents in the present case may institute on their own initiative and maintain actions under Section 3 First (p) of the Railway Labor Act, notwithstanding the pendency of a previously instituted suit, like the present one, to have the rights of the parties declared with respect to the same issues.

Clearly, therefore, a suit brought by the employes under Section 3 First (p) of the Railway Labor Act would not be barred by the existence of a prior suit for declaratory judgment, instituted by the carrier in another court, and the employes are accordingly free to begin such suit on their own initiative, for the purpose of securing whatever

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*This rule has been followed in many cases, among which the more recent ones, involving circumstances of the same character as those in the *Roe* case, are: *Aetna Casualty & Surety Co.* v. *Yeatts*, 99 F. (2d) 665 (C. C. A. 4th, 1938); *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. (2d) 514 (C. C. A. 3d, 1938); *Central Surety & Ins. Corporation* v. *Norris*, 103 F. (2d) 116 (C. C. A. 5th, 1939); *Ballard* v. *Mutual Life Ins. Co. of New York*, 109 F. (2d) 388 (C. C. A. 5th, 1940).

Of course these cases are to be sharply distinguished from the group of cases in which subsequent suits between the same defendants and the same plaintiffs involving the same issues have been enjoined in order to prevent harassment from multiplicity of suits. But even this *quia timet* jurisdiction of the courts of equity will not be exercised "unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation": *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 29 S. Ct. 426 (1909). To like effect are *Matthews* v. *Rodgers*, 284 U. S. 521, 52 S. Ct. 217 (1932), and *Moor* v. *Texas & N. O. R. Co.*, 75 F. (2d) 386 (C. C. A. 5th, 1935).

Another group of cases which must be distinguished from the present case consists of those involving suits for infringement of patent rights, as for example, *Milwaukee Gas Specialty Co.* v. *Mercoid Corporation*, 104 F. (2d) 589 (C. C. A. 7th, 1939). A patent is in the nature of a *res*, in the sense that a suit for its infringement does not involve simply a personal liability but is concerned with issues as to the ownership of a particular device or thing. Accordingly, suits involving patent infringements generally fall within the exception to the general rule noted in *Kline* v. *Burke Constr. Co.*, *supra*, whereby in the case of an action *in rem* or *quasi in rem* the exercise by a second court of jurisdiction over a *res* to which the jurisdiction of another court has previously attached would impair or defeat the jurisdiction of the first court.

advantages may accrue to them therefrom. *A fortiori*, a Section 3 First (p) proceeding brought by the employes in the same court would not be barred, since there could in any event be no question of interference with or impairment of the court's jurisdiction in such a case.

Could the carrier, as party plaintiff in the prior suit, successfully apply to the court having jurisdiction of the second suit—whether the same or a different court—for a discretionary stay of the proceedings in the latter suit, on the ground of priority of the jurisdiction of the court in which the earlier suit was filed? The answer to this must of course be "no," for two reasons. In the first place, the cases and principles already reviewed show that no priority of jurisdiction is obtained by the suit which is filed first, where both actions are *in personam* and where there is no element of harassment. In the second place, the granting of a stay of proceedings already pending is a matter for the sound discretion of the court. Thus, in *Landis* v. *North American Co.*, 299 U. S. 248, 57 S. Ct. 163 (1936), this Court, speaking through Mr. Justice Cardozo, said (pp. 254-55 of 299 U. S.):

> "• • • the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.*" (Emphasis supplied.)

If it is shown to the court having jurisdiction of the second suit, initiated by the employes under Section 3 First (p) of the Railway Labor Act, that Congress intended the employes to have certain advantages in the latter suit which they did not have in the declaratory judgment suit, it is wholly unlikely that the court in which the employe-initiated suit under Section 3 First (p) was

pending would stay proceedings in that suit merely because of the fact that the declaratory judgment suit was filed first. To grant such a stay would, under those circumstances, clearly constitute an abuse of the court's discretion.

But, even though the employes' subsequent suit is not barred by the prior institution of the declaratory judgment suit and could not be stayed on account of the prior suit, is it not possible that the prior suit would proceed to judgment before the conclusion of the second suit, so that the employes in the second suit might then be confronted with the judgment in the prior suit as the basis for a plea of *res adjudicata?* To this the answer must be that, if the procedure provided by Section 3 First (p) of the Railway Labor Act and invoked by the employes in the second suit was intended by Congress to secure to the employes advantages which they cannot obtain in the first suit, as respondents and the majority below assume, then the court having jurisdiction of the first suit would necessarily be bound in the exercise of sound discretion to stay further proceedings in that suit and thereby permit the second suit to proceed first to judgment.

2. Assuming That Congress Intended the Advantages of the Procedure Under Section 3 First (p) of the Railway Labor Act to be Preserved to the Employes, the Court Having Jurisdiction of the Declaratory Judgment Suit Would, in the Exercise of Its Discretion, Grant a Stay of That Proceeding Upon the Commencement of a Suit by the Employes Under Section 3 First (p); and to Do Otherwise Would Clearly be an Abuse of Discretion by the Court.

As pointed out in *Landis* v. *North American Co., supra,* the granting of a stay of proceedings is within the sound discretion of the court having jurisdiction of the proceedings. Moreover, the facts as well as the reasoning in that case would afford ample authority to a court

having jurisdiction of a previously instituted declaratory judgment suit for granting a stay of proceedings in that suit, upon application of the employes as plaintiffs in a suit filed in the same or another court under the provisions of Section 3 First (p) of the Railway Labor Act. In the *Landis* case, certain public utilities had filed suits in the District of Columbia against the members of the Securities and Exchange Commission to enjoin enforcement of the Public Utility Holding Company Act of 1935 on the ground of its unconstitutionality. At about the same time, the Securities and Exchange Commission filed a complaint in a Federal District Court in New York to compel certain other public utilities to comply with the Holding Company Act. Shortly thereafter a motion for stay of proceedings was filed on behalf of the members of the Commission in the District of Columbia suits, on the ground that to proceed with the trial of the District of Columbia suits simultaneously with the New York suit, when substantially the same issues were involved in both cases, would impede the orderly and economical disposition of the controversy. The motion to stay proceedings in the District of Columbia was opposed on the ground that the parties were not the same as in the New York suit, but the motion was nonetheless granted by the District of Columbia Court. This was reversed by the Court of Appeals, but *certiorari* was granted by this Court, which reversed the Court of Appeals. In addition to the passage quoted above (page 180), Mr. Justice Cardozo said (pp. 254-56 of 299 U. S.):

> "Viewing the problem as one of power, and of power only, we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical. • • • True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward,

if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. *Considerations such as these, however, are counsels of moderation rather than limitations upon power.* • • • *We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.*" (Emphasis supplied.)

Thus, despite the fact that the parties were not the same in both the District of Columbia and the New York suits, although the issues were substantially alike, this Court remanded the proceedings to the District of Columbia Court for the exercise of its discretion in the light of all the circumstances and of this Court's opinion. In the District Court's reconsideration of the motion for stay, "Benefit and hardship will be set off, the one against the other, and upon an ascertainment of the balance discretionary judgment will be exercised anew" (p. 259 of 299 U. S.).

To like effect is the opinion of this Court in *Amer. Life Ins. Co.* v. *Stewart,* 300 U. S. 203, 57 S. Ct. 377 (1937). In that case an insurance company began an equitable action to cancel certain policies on the ground of fraud. Subsequently, the beneficiaries sued on the policies at law in the same court. After motions for dismissal were filed by the defendants in the equity action and were denied by the trial court, the parties in that action stipulated that the equity suit should continue and should be tried before the action at law was tried. In

view of the stipulation, there could of course be no question as to the grant of a stay of proceedings. However, in reversing the holding of the Circuit Court of Appeals to the effect that the insurer had an adequate remedy at law and therefore its equitable action was improperly brought, this Court, again speaking through Mr. Justice Cardozo, used language which is particularly apt for the present case (pp. 212-16 of 300 U. S.):

> "No doubt it is the rule, and one recently applied in decisions of this court, that fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available. • • • That being so, an insurer, though the victim of a fraud, may commonly stand aside and await the hour of attack. *But this attitude of aloofness may at times be fraught with peril.* • • • *Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there praying cancellation.* • • • *There is indeed, a possibility that the bringing of actions at law might have been used by respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. Landis* v. *N. American Co., 299 U. S. 248. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another especially where the parties and the issues are the same. Ibid. If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity.*" (Emphasis supplied.)

Thus, Mr. Justice Cardozo suggests quite plainly in that case that it would have been entirely proper, and in fact desirable, for the District Court, upon application by the respondents in that case, to grant a stay of the prior equitable suit in order to permit the subsequently instituted action at law brought by the respondents on the policies to proceed to a conclusion.

Likewise, in the present case it is clear, in the light of the above decisions, that if, following the institution by the carrier of a declaratory judgment proceeding of the kind here involved, the employes should begin suit under Section 3 First (p) of the Railway Labor Act, and should then apply to the court for a stay of the declaratory judgment proceeding, it would be entirely within the discretion of the court to grant such a stay, since not only the issues but the parties as well would be the same. And if the employes could show to the court having jurisdiction of the declaratory judgment proceeding that Congress in enacting the Railway Labor Act intended them to have advantages which they could obtain only in their subsequent suit under Section 3 First (p), so that the intent of Congress as manifested in that Act would be better fulfilled by staying the declaratory judgment proceeding while the suit under Section 3 First (p) proceeded to judgment, it is certain that it would be an abuse of discretion on the part of the court to refuse such a stay. This is of course true whether the declaratory judgment suit and the Section 3 First (p) proceeding are in the same court or in different courts, since in both situations it would be an abuse of discretion on the part of the court having jurisdiction of the declaratory judgment suit to refuse to stay it in favor of another proceeding pending between the same parties and involving the same issues, when it was shown that the latter proceeding would enable the court to carry out more fully the manifest intent of Congress.

This argument was claimed by respondents, in their brief on the original argument in this court, to be unsatis-

factory, for the reason that the action of courts in exercising their judicial discretion is unpredictable and undependable, according to respondents. But this reasoning of respondents is too rigid and at the same time reflects the same lack of confidence in the wisdom and discretion of courts generally that underlies the unwillingness of the labor organizations to take their disputes with employers into court. Respondents are not satisfied with the type of relief on which most litigants must depend, namely, relief by decision within the field of a court's judgment and discretion. On the contrary, respondents want a remedy which is absolutely mechanical and in which they can be assured in advance, by elimination of the factor of human judgment, of a decision in their favor. Respondents forget that appellate courts are created to correct mistakes of judgment and abuses of discretion made by trial courts and lower appellate courts, and that, if the appellate courts of last resort are likewise occasionally chargeable with errors of judgment, such errors of judgment proceed from the same frailties of human nature to which all litigants are and will continue to be exposed so long as courts are composed of human beings.

Clearly, it would be reversible error for a court to refuse to stay a declaratory judgment suit, when shown that another proceeding involving the same parties and the same issues, brought under Section 3 First (p) and actually pending, would be more appropriate to fulfill the intent of Congress, just as much as it would be reversible error for a court to construe and apply statutory language in a manner contrary to the intent of Congress as plainly expressed in other parts of the statute and in its legislative history.

In any event, the question would not arise in the present case, because counsel for petitioner in this case expressly stated to the District Court (R. 300) that petitioner would raise no objection to permitting a suit by the employes under Section 3 First (p) of the Railway Labor Act, if

such a suit were brought, to proceed in preference to the declaratory judgment suit.

The purpose of petitioner in instituting the present declaratory judgment suit is not to deprive the employes of advantages in litigation which they would have and which Congress intended them to have in a proceeding under Section 3 First (p) of the Railway Labor Act. Petitioner is concerned, not that it shall have judicial relief in any particular form, but that it may have an opportunity for judicial determination, in *some* form, of its rights and liabilities under the contract with its employes, and that it shall not be forced to comply with the Board's award without judicial consideration of the question whether that award represents a correct interpretation of petitioner's obligations under the contract. It has chosen this method of proceeding because it appears to be the only course open to it whereby it may have some hope of obtaining the judicial consideration which would otherwise, under the circumstances of the case, be barred to it. As stated by Mr. Justice Cardozo in *Amer. Life Ins. Co.* v. *Stewart, supra,* an "attitude of aloofness may at times be fraught with peril," so that a party against whom a claim is threatened but not actually pressed to judicial decision may "be condemned to loss through the mere inaction of an adversary." That is exactly the situation of petitioner in the case at bar. What it seeks to accomplish by the present action is not the denial to respondents of advantages otherwise available to them, or the frustration of Congressional intent, but merely the protection of its fundamental right to a judicial determination of its obligations and liabilities with respect to a controversy under its contract with its employes.

Clearly, therefore, the majority of the Court of Appeals below erred in assuming that it was necessary to construe the Railway Labor Act so as to exclude a declaratory judgment proceeding like the present one, in order to

preserve to the employes such advantages as Congress intended them to have in a suit under Section 3 First (p). Those advantages were still available to the employes after the present suit was brought, and could be readily obtained by them by the institution of a suit under Section 3 First (p), in the manner indicated above.

The fact is that what the employes really want to protect is not the preservation of advantages available to them in Section 3 First (p) proceedings but their privilege of not instituting a Section 3 First (p) proceeding at all, and the opportunity which that privilege, coupled with the employer's lack of opportunity to obtain judicial relief, gives them to obtain compliance with awards of the Board through the exertion of economic pressure. If the objective of the employes were really to secure for themselves the advantages which they now appear so anxious to preserve, they would long ago have manifested their interest in those advantages by bringing Section 3 First (p) proceedings in order to obtain them. The fact that the employes have steadfastly refused to bring such suits shows that their real aim is to preserve their privilege of exercising their full economic power to compel compliance, by barring the employer from access to its only means of obtaining relief, namely, the courts.

E. The Fact That Petitioner Appeared and Defended Itself Before the Adjustment Board Does Not Amount to a Voluntary Choice or Election By It of the Adjustment Procedure So as to Bar it Thereafter From Asserting Its Right to Judicial Relief Subsequently to the Issuance of the Award.

Even if it is assumed that the *Moore* case was correctly decided and that the system of adjustment provided in the Railway Labor Act is essentially voluntary in nature, nevertheless it might still be contended that, where the employer appears and defends itself before the Adjust-

ment Board, the employer thereby consents to the use of the Adjustment Board procedure and is thereafter barred from asserting its right to judicial relief subsequently to the issuance of an award by the Board. This was in fact the ground on which the majority below attempted to distinguish the *Moore* case, so as to reach the conclusion which it did without coming into conflict with that case (see pp. 244, 249 of 124 F. (2d); R. 338, 345).

But this position of the majority below rests on the assumption that the employer in appearing and defending itself before the Board in response to a unilateral submission by the employes manifests a voluntary choice or election of the adjustment procedure as the method by which the employer is willing to have the dispute determined. This assumption is obviously false, for the reason that, as pointed out in Section II above (pp. 82-92), the employer in fact has no choice in the matter but is obliged to appear and defend itself as best it can against a unilateral submission by the employes, or run the risk of having an award entered by default against it. A "choice" or "election" clearly contemplates the existence of two or more alternatives and the voluntary exercise of a preference for one of those alternatives as against the other alternative or alternatives.* Here the employer has no such opportunity voluntarily to select its preference of two or more alternatives. There is as a practical matter only one course open to it, namely, to appear before the Board and make the best defense possible.

To hold, in the face of these facts, that the employer's appearance before the Board in response to a unilateral submission of a dispute by the employes constitutes a choice or election by the employer of the adjustment method so as to bar it thereafter from asserting its right to judicial relief would amount to resting the decision on two false premises. In the first place, it would amount to ignoring altogether the fact that the adjustment provisions of the Act, as thus construed, would operate in a compulsory way upon the employer, contrary to the deci-

* See cases cited in footnote on p. 171 above.

sion of this Court in the *Moore* case (see pp. 62-64 above). In view of the compulsory operation which those adjustment provisions as a matter of fact have, if the employer is denied access to the courts after the issuance of an award by the Board, it cannot consistently be said that there is in any proper sense an element of voluntary exercise of preference on the employer's part in appearing and defending itself in response to a unilateral submission of a dispute to the Board by the employes.

In the second place, such a holding would assume the very point to be proved. Even if it were conceded that there is an element of voluntary choice on the part of the employer when it appears before the Adjustment Board in response to a unilateral submission by the employes, it does not follow that the employer is thereby barred from subsequently resorting to the courts for the determination of its legal rights in a proceeding other than a suit under Section 3 First (p). That conclusion would follow only by making a further assumption, which would be an assumption of the very point to be proved. It would follow only if it is taken for granted that the Section 3 First (p) type of proceeding must be treated as an exclusive judicial remedy with respect to claims which have been submitted to the Adjustment Board. But that is the ultimate proposition which respondents are here attempting to establish, and it is a proposition which has already been shown to be unsound, since it is not supported either by the legislative history or by any supposed policy of the Railway Labor Act (pp. 64-79, 137-72 above), and since it is not required in order to secure to the employes advantages which Congress allegedly intended by Section 3 First (p) to secure to them (pp. 172-88 above).

Without the support of this false assumption of the very proposition which respondents are attempting to establish as the ultimate holding of the court, there is no foundation for the conclusion that the employer by participating in the proceeding before the Adjustment Board

thereby manifests a voluntary choice or election of the method of adjustment which results in depriving it of the right which it would otherwise have to resort to the courts for judicial relief.

Even if there were a foundation for the conclusion that petitioner had voluntarily chosen the adjustment procedure by appearing before the Board in response to the employes' submission, it would not follow that petitioner should be held to have waived its right to resort to the courts so as to be thereafter barred from such resort. The conclusion that petitioner should be so barred could rest only on principles of estoppel, as embodied in the so-called doctrine of election of remedies. But, as shown by the cases cited above (see footnote on pp. 170-71), that doctrine has no application unless there is a choice of one remedy giving rise to rights which are infringed by a subsequent shift to another and inconsistent remedy. Here there is no shift to an inconsistent remedy resulting in an infringement of rights. The inconsistency which must exist as a condition precedent to the application of the doctrine of the election of remedies does not consist merely of differences in methods of procedure or forms of action, but is that which arises from the irreconcilability of legal theories upon which the respective remedies are founded. In the present case there is no such inconsistency between the remedies, *i. e.*, between the theories of the two methods of determination of the controversy here involved. Whether the determination is by application to the Board of Adjustment and suit to make effective rights declared in the Board's award under Section 3 First (p) of the Act, on the one hand, or by a declaratory judgment proceeding, on the other hand—or for that matter, by a suit in court for damages by the employes, as in the *Moore* case—the rights and liabilities involved are determined by the same contract between the carrier and its employes, and the outcome depends upon the interpretation of that contract, which interpretation must be the same, regardless of the particular form of action in which the interpretation is sought.

SECTION IV.

(Answer to the Court's Third Question.)

THE EXPIRATION OF THE TWO-YEAR PERIOD OF LIMITATION SPECIFIED BY SECTION 3 FIRST (q) OF THE RAILWAY LABOR ACT FOR PROCEEDINGS BROUGHT UNDER SECTION 3 FIRST (p) HAS NO EFFECT IN RESTRICTING THE RIGHT OF EITHER PARTY TO THE DISPUTE TO OBTAIN A DETERMINATION OF IT IN THE COURTS IN A PROCEEDING NOT BROUGHT UNDER SECTION 3 FIRST (p), THE RESTRICTIVE EFFECT OF THE TWO-YEAR LIMITATION BEING CONFINED TO THE LATTER TYPE OF PROCEEDING; BUT ON THE CONTRARY THE EXPIRATION OF THE TWO-YEAR PERIOD SHOULD OPERATE TO PERMIT A PROCEEDING LIKE THE PRESENT ONE NOW TO GO FORWARD EVEN IF THE CONTENTION BE ACCEPTED THAT IT COULD NOT HAVE GONE FORWARD DURING THE TWO-YEAR PERIOD.

The third question put by this Court in its order of November 16, 1942, is as follows:

> "3. The effect of the expiration of the two-year period specified by Section 3 First (q) upon the right of either party to the dispute to obtain a determination of it in the courts."

Two problems are suggested by the language of this question. In the first place, the question suggests that this Court may be concerned to know whether or not or to what extent the majority of the Court of Appeals below were correct in the view which they apparently held, to the effect that the two-year period of limitation provided in Section 3 First (q) of the Act should be

construed as indicating that the employer is excluded, at least during that period, from access to the courts for determination of its rights and obligations in any other than a Section 3 First (p) proceeding, in order to preserve to the employes the advantages which Congress intended them to have in such a proceeding (pp. 241, 244, 249, 251 of 124 F. (2d); R. 335-36, 338, 345, 347). It will be shown below (pp. 197-202) that the logical conclusion from this view, which conclusion the majority of the Court of Appeals apparently recognized but did not expressly accept, is that, since the reason for holding the Section 3 First (p) type of proceeding to be the exclusive judicial remedy available to either the employes or the employer during the two-year period is to protect the advantages provided to the employes in such proceedings, that reason is no longer present after the expiration of the two-year period, when a Section 3 First (p) proceeding with its advantages is no longer available to the employes, and therefore the effect of the two-year period of limitation should be merely to *suspend* for that period the right of either party to resort to the courts for a judicial determination of the dispute in any other than a Section 3 First (p) proceeding.

In the second place, the language of the third question put by this Court also suggests—as did some of the questions asked from the bench during the original argument of the present case before this Court—that the Court may have had in mind the contention which might conceivably be made that the fact that a period of more than two years had expired since the issuance of the award involved in the present case had resulted in setting up a bar to any recovery by or relief for the employes in the courts, and that it followed that the controversy was no longer a live and active one, since the employer was no longer confronted with the possibility of having a judicially enforceable order entered against it, and accordingly the case did not now involve an actual controversy which would constitute the basis for a declaratory judgment.

Another way of stating this latter argument would be to say that, if the employes no longer had any opportunity to obtain relief in the courts in any form, then the employer would no longer be faced with the need of obtaining a declaratory judgment, and the case would therefore be moot.

At the outset, it is important to point out that these two propositions, suggested by the language of this Court's third question, are inconsistent with one another. According to the proposition first stated above, representing the view of the majority below, the right of the employer to resort to the courts on its own initiative for a judicial determination of the dispute would be suspended during the two-year limitation period in order to preserve to the employes the opportunity to make use of the advantages given them in a Section 3 First (p) proceeding, and the logical consequence of this view would be that after the expiration of that period the employer may again resort to the courts, just as, under the decision in the *Moore* case, it had that right prior to the submission of the dispute to the Adjustment Board. On the other hand, the second proposition suggested above would lead to the conclusion that neither the employer nor the employes had any right of access to the courts after the expiration of the two-year period, because there would then no longer be a live and active controversy, and the case would therefore be moot. The result of both arguments, taken together, would be to exclude the employer entirely from any right of access to the courts either during the two-year period or after its expiration, and to compel the employer to be bound by the award of the Adjustment Board, without any judicial determination of its rights and obligations under its contract with its employes.

Each of these two propositions will be considered in turn, and it will be shown that neither of them is valid to bar petitioner, under the facts of the present case, from seeking in the present declaratory judgment pro-

ceeding a judicial determination of its rights under its contract with respondents. In other words, the answer to this Court's third question must be that the expiration of the two-year period of limitation specified by Section 3 First (q) of the Act has no effect in restricting the right of either party to the dispute to obtain a determination of it in the courts otherwise than in a proceeding under Section 3 First (p), the restrictive effect of the two-year period of limitation being confined to the latter type of proceeding, and that on the contrary the expiration of the two-year period should actually operate to permit a proceeding like the present one to go forward even if the contention be accepted that it could not have gone forward during the two-year period.

The language of Section 3 First (q) of the Railway Labor Act is as follows:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Two preliminary questions are presented by this language: First, what are the "actions at law" to which the limitation period applies; and second, what is the date from which the two-year period begins to run.

With regard to the first of these questions, the answer seems clearly to be that the restrictive effect of the limitation period is confined to suits brought under Section 3 First (p) of the Act. The language quoted above from Section 3 First (q) specifically states that the limitation therein provided applies to "actions at law based upon the provisions of this section," which can only mean actions at law based upon Section 3 of the Railway Labor Act, and the only portion of that section which provides for an action at law is Section 3 First (p). There is nothing in Section 3 First (q), or elsewhere in the Act, to indi-

cate that Congress intended the two-year limitation therein enacted to apply to any other type of proceeding than a Section 3 First (p) proceeding, and accordingly, since the language of Section 3 First (q) specifically directs the application of the limitation period to Section 3 First (p) proceedings and to no other types of proceedings, it must be construed as applying only to such proceedings.

With regard to the second preliminary question, viz., the date from which the two-year limitation period begins to run, the answer is again clear. Section 3 First (p) shows on its face that it is designed to enable a party who has obtained from the Adjustment Board a favorable award to make effective his rights as declared in that award, where the losing party fails otherwise to comply, through the means of a suit in court in which the award of the Board will be accepted as *prima facie* evidence of the facts found. Since the purpose of Section 3 First (p) thus is to permit the winning party before the Board to invoke judicial aid to make effective his rights as declared in the award of the Board, it seems clear that the date from which the two-year period within which such a suit under that section must be begun was intended to be the effective date of the award which declares the rights sought to be enforced in the suit. While the phrase used in this connection in Section 3 First (q), viz., "from the time the cause of action accrues under the award," is not as apt as it might be to describe the date of the Board's award, it is nevertheless clear that that phrase is intended to refer to the time when suit can first be brought to make effective the rights declared in the award, and that time is, of course, the day on which the award purports to become effective under the order of the Board. This interpretation as to the time from which the two-year period begins to run is the one which has been adopted by both parties throughout this case and by the Court of Appeals below, since it has been assumed

throughout that the two-year period of limitation referred to in Section 3 First (q) of the Act has now in fact expired with respect to the award of October 24, 1938. Moreover, this interpretation has apparently been accepted also by this Court, since the Court's third question plainly assumes that the two-year period has, in fact, expired, and inquires merely as to the effect of such expiration upon the rights of the parties.

Thus, it is clear that the two-year period of limitation specified in Section 3 First (q) of the Act applies only to proceedings brought under Section 3 First (p) of the Act and that the two-year period within which such a suit must be brought begins to run from the effective date of the award of the Board which declares the rights sought to be made effective in the suit. It follows that in the present case it is no longer open to the respondents to bring suit under Section 3 First (p) of the Act to make effective the rights declared in the award issued by the Board on October 24, 1938.

With the proper construction of Section 3 First (q) of the Act thus established, consideration will now be given to the two propositions referred to above as being suggested for discussion by the language of this Court's third question.

A. If the View Apparently Held by the Majority Below is Correct, Viz., That the Two-Year Limitation Provided in Section 3 First (q) Operates to Suspend for That Period The Right of Either Party to Resort to the Courts Except In a Section 3 First (p) Proceeding, Nevertheless the Present Proceeding Should Be Permitted to Go Forward Since the Two-Year Period Has Now Expired.

Let it be assumed that the contention of the majority of the Court of Appeals below—which is also the contention of respondents—is correct, viz., that although resort to the courts prior to submission of the dispute to the

Adjustment Board is not precluded, as this Court has held in the *Moore* case, nevertheless, following submission of the dispute to the Board resort to the courts is precluded except under the provisions of Section 3 First (p) of the Act. That view depends on the assumption, shown to be unsound and untenable (pp. 93-191), that the statutory suit provided by Section 3 First (p) was intended by Congress to be exclusive. According to that view, when a dispute arises between a carrier and its employes, which is of the kind contemplated by Section 3 of the Railway Labor Act, then the employes have a choice of alternatives: either they may, as held in the *Moore* case, seek relief in the courts in the first instance, as in a suit for damages for alleged breach of contract or in a proceeding for injunctive relief, or they may submit the dispute to the Adjustment Board in accordance with the provisions of the Railway Labor Act and may thereafter, upon receiving a favorable award from the Board, seek to make effective the rights declared in that award by instituting suit under Section 3 First (p) of the Act. If the latter alternative is adopted, then, under the view of the majority of the Court of Appeals, the Section 3 First (p) type of proceeding becomes the exclusive method of enforcing the rights declared in the Board's award, because according to that view Congress intended the Section 3 First (p) proceeding to be exclusive where a favorable award of the Board has been obtained in order to preserve to the employes the advantages given them in a suit brought under that section.

Thus, on that view, the basis for assuming that resort to the courts in any proceeding other than a Section 3 First (p) proceeding is precluded after a dispute has been submitted to the Adjustment Board and has become the subject of an award by that Board is that the Section 3 First (p) remedy must be held to be exclusive in order to insure protection of the advantages given the employes in such a proceeding. Obviously, therefore, the

logical conclusion to be drawn from that view is that where a Section 3 First (p) proceeding, with its alleged advantages, is no longer available to the employes, as in a case where the two-year period of limitation imposed on such suits by Section 3 First (q) has expired, then the reason no longer exists for holding resort to the courts in other forms of proceedings to be excluded, and judicial relief in such other forms of proceedings should therefore be held to be available to the parties under those circumstances, just as such relief on this view was available to them prior to submission of the dispute to the Adjustment Board. In other words, the view which agrees with this Court's decision in the *Moore* case and at the same time holds that the availability of a proceeding under Section 3 First (p) after an award has been issued excludes resort to the courts in other forms of proceeding should, if it is to be logically consistent, hold that the effect of the availability of the Section 3 First (p) type of proceeding is merely to *suspend* resort to the courts in other forms of proceedings for a period of two years following the issuance of the Board's award.*

Therefore, in the present case, since the two-year limitation period applicable to proceedings under Section 3 First (p) has expired, and a suit under that section, with its supposed advantages, is no longer available to the employes to make effective rights declared in the award of October 24, 1938, there is no reason, on the view here being considered, why either the employer or the employes should not again be free to resort to the courts for relief in some other form of proceeding, with respect to the

*This logical conclusion of their holding seems to have been recognized by the majority of the Court of Appeals below, as is indicated by the language used in the majority opinion in the *Moore* case in its discussion of this point (*e. g.*, R. 335-36, 338, 345, 347: pp. 241, 244, 249, 251 of 124 F. (2d)), as, for example, the following:

> "* * * because the Act gave the employees two years in which to sue for enforcement, we think Congress intended the courts *during that period* to keep hands off these controversies except in the manner specified in the Act." (R. 338; p. 244 of 124 F. (2d).) (Emphasis supplied.)

practice out of which the present dispute grows, which practice is a continuing one and is still going on at petitioner's station. It follows that there is no longer any reason why the present proceeding should not be permitted to go forward to a declaratory judgment with respect to the controversy still existing between petitioner and respondents regarding the practice in question.

Of course it might be suggested that since the present proceeding was begun within the two-year suspension period it must be subject throughout to the infirmity to which it would on this view be subject during the two-year period, so that the question whether or not the proceeding should be permitted to go forward can not be affected by anything that happens while the proceeding is going on, such as the expiration of the two-year period. But surely this would be an unduly technical and futile approach. It would be an idle gesture for this Court to hold that the present proceeding must be barred because it was begun during the two-year period, although another proceeding exactly like it could be carried through to a declaratory judgment if instituted after the expiration of the two-year period, because as soon as the Court's decision to that effect were made known another proceeding exactly like this one could be instituted at once, and the Court would soon have before it exactly the same questions as it has in the present proceeding. Such a disposition of the case would amount to an empty waste of the Court's time and effort.

Accordingly, if the *Moore* case has been correctly decided and if the reasoning of Mr. Justice Black's opinion in that case is sound, then there is no reason why the present proceeding should not be permitted to go forward to a declaratory judgment, in view of the fact that the two-year period, during which it might be claimed that the Section 3 First (p) proceeding should be held to be exclusive in order to protect the supposed advantages available thereunder to the employes, has now expired.

It has of course been shown above (pp. 172-88) that there is no need to hold the Section 3 First (p) proceeding to be exclusive in order to protect the employes' supposed advantages thereunder, since the commencement of another type of proceeding on the employer's initiative, as in the present case, would not prevent the employes from instituting during the two-year period and going forward with a Section 3 First (p) proceeding in which they could secure to themselves all the advantages provided thereunder. Therefore, there is no reason for holding that resort to the courts in other forms of proceeding than the Section 3 First (p) proceeding is even suspended for the two-year limitation period, since the reason given for holding such proceedings suspended during that period, namely, to secure to the employes the advantages available to them in a Section 3 First (p) proceeding, has been shown to be unsound. But even if that reason were sound, and it were held that the right of recourse to the courts in any form of proceeding other than a Section 3 First (p) proceeding must be considered suspended for a period of two years following the effective date of an award of the Board so as to insure the availability to the employes of the advantages given them in a Section 3 First (p) proceeding, nevertheless the present proceeding should be permitted to go forward, because that bar has now been lifted with the expiration of the two-year period following the Board's award.

It results from what has been said above that, even if the first proposition suggested by this Court's third question, representing the view apparently held by the majority below, is correct, namely, that the two-year limitation provided in Section 3 First (q) must be construed as suspending for that period the right of either party to resort to the courts except in a Section 3 First (p) proceeding, nevertheless that proposition does not now bar the present proceeding, which should be permitted to go

forward to a declaratory judgment, since the two-year period has now expired. It remains to consider the second proposition suggested by this Court's third question.

B. The Fact That the Two-Year Period of Limitation Has Expired in the Present Case Does Not Render the Case Moot Or Constitute a Bar to Its Going Forward to a Declaratory Judgment.

It will be recalled that the second proposition suggested by the Court's third question, which was also suggested by some of the questions from the bench during the original argument, is the contention which might be made that, since the two-year limitation period has expired, the employes are now wholly barred from obtaining judicial relief in any form of proceeding with respect to the dispute in question, with the result that the employer is no longer confronted with the danger of having a judicially enforceable order entered against it and accordingly the case no longer involves an actual and existent controversy which would constitute the basis for a declaratory judgment. To state it in another way, the purport of this contention is that the employer is no longer in need of a declaratory judgment and the case is therefore moot.

However, examination of the matter will show that this contention is unsound because its premise is unsound, and that the employes are in fact not barred, by the expiration of a period of two years from the date of the Board's award, from recourse to the courts for relief in connection with the dispute in question, except that they are of course barred from bringing a suit under Section 3 First (p) of the Act predicated upon the Board's award of October 24, 1938.

It has been shown above (pp. 24-191) that neither party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts at any time, either before or after submission of the dispute to the Board. With refer-

ence to the employes this has been specifically shown at pages 167-72 above. Since this is so, and since the substantive legal basis on which the employes' claim is founded and which gives rise to the substantive rights asserted by them is not the Railway Labor Act but the contract between the parties and the ordinary principles of contract law applicable thereto (see pp. 27-30 above), the governing statute of limitations, in any legal proceeding brought by the employes to enforce their contract rights other than a proceeding under Section 3 First (p) of the Railway Labor Act, would be the ordinary statute of limitations applicable to such an action to enforce contract rights, and not the two-year limitation period provided in Section 3 First (q) of the Railway Labor Act. As already demonstrated (pp. 195-96 above), the two-year limitation period therein provided is specifically and simply a limitation on suits begun under the provisions of Section 3 First (p) of the Act. Such being the case, it follows that the only effect of the expiration in the present case of a period of two years from the date of the Board's award is that any suit by an employe or employes under Section 3 First (p) of the Act is now barred.

Let it be supposed, for example, that employes having a dispute with their carrier-employer growing out of a contract between the carrier and its employes brought suit in a state court, claiming damages for breach of the contract. Obviously, the statute of limitations applicable to such a suit would be, not the provisions of Section 3 First (q) of the Railway Labor Act, but the ordinary state statute of limitations applicable to actions for breach of contract in that state. If such a suit may be maintained by the employes, notwithstanding the fact that the dispute is one which might be, or in fact had been, submitted to the Adjustment Board, then it is plain that the suit could be maintained at any time within the limitation period provided in the state statute of limitations, regardless of the provisions of Section 3 First (q) of the Rail-

way Labor Act. The same thing would, of course, be true with respect to a proceeding brought in a state court to enjoin a threatened breach of contract between the carrier and its employes, and the governing statute of limitations in such a case would be the applicable state statute of limitations and not the provisions of Section 3 First (q).

In the ordinary case the proper forum for a suit for damages for breach of contract or for injunctive relief would be a state court, with respect to contracts between carriers and their employes as well as with respect to other types of contracts, since the substantive rights sought to be enforced in such a suit grow out of the contract and not out of the Railway Labor Act, which does no more than create a new and additional remedial procedure for the enforcement of those rights (see pp. 24-31 above). The mere fact that an employe of a carrier has a dispute with his employer growing out of a contract alleged to exist between them and that such a dispute is one which might have been submitted to and determined by the Adjustment Board is not a sufficient ground of Federal jurisdiction except in a suit under Section 3 First (p) of the Railway Labor Act. In the absence of some ground which is adequate to support Federal jurisdiction, such as diversity of citizenship, an ordinary suit for damages or for injunctive relief with respect to a contract between a carrier and its employes cannot be maintained in a Federal court but must, like other suits based on private contracts, be brought in a state court.*

In the present case, since the dispute arises in the District of Columbia, the court which would have jurisdiction of an ordinary suit for damages or injunctive relief with respect to a dispute growing out of the contract in question between petitioner and its employes happens to be the same court as that which would have jurisdiction of

* See footnote on p. 30 above and cases cited therein. It will be noted that the great majority of the cases which have in fact arisen with respect to contracts between carriers and their employes have been in the state courts. See cases cited above, pp. 25-30.

a suit under Section 3 First (p), viz., the District Court. However, the analogy to a suit brought in a state court subject to a state statute of limitations still applies, and a suit brought in the District Court for the District of Columbia to recover damages for breach of a contract between petitioner and its employes would be subject to the ordinary statute of limitations applicable to other suits brought in that District Court for damages for breach of contract. The statutory period applicable to such suits under the District of Columbia Code is three years (Title 12, District of Columbia Code, 1940 edition, Sec. 12-201). Accordingly, assuming that an action for damages for breach of contract may be maintained by the employes notwithstanding the fact that the dispute has been submitted to the Adjustment Board and has been the subject of an award by the Board, the employes may at any time bring suit in the District Court for the District of Columbia to recover damages for the alleged breach of their contract with petitioner, and in such suit the employes would be entitled to recover damages for any breach or breaches of contract which they proved to have taken place within the period of three years prior to the institution of the suit. Since the practice which the employes claim to be a breach of contract in the case of the present dispute has been and is a continuing one, there would undoubtedly be instances of that practice on which the employes could found such a suit, as constituting alleged breaches of the contract committed within the period of three years prior to the institution of suit.

Thus, since, as has been shown above, the employes are free, either prior to submission of a dispute to the Board or at any time after the dispute has been so submitted, to institute a suit in the courts for damages for alleged breach of contract or for injunctive relief, it follows that such a suit may be instituted for any alleged breaches committed within the period of limitation provided in the statute of limitations applicable to such a suit and

that it is immaterial whether or not the two-year period provided by Section 3 First (q) of the Railway Labor Act, as a limitation upon suits brought under Section 3 First (p), has expired. Even though that two-year limitation period has expired in the present case, it is still possible for the employes to bring suit in court, in some form, to enforce the very contract rights which they claim to have and which petitioner in the present proceeding denies that they have and upon the determination of which the substantive issue at stake in the present proceeding depends. Therefore, the present proceeding, the ultimate purpose of which is to determine that issue, involves a controversy which is still a live and active one, and accordingly the proceeding should be permitted to go forward to a declaratory judgment with respect to that controversy.

The foregoing argument has proceeded on the basis of petitioner's contention, developed in earlier parts of this brief (Sections I and III above), that neither party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts either before or after submission of the dispute to the Adjustment Board. Let it be supposed, however, for the purpose of argument that a contrary assumption be accepted, and that it be assumed either (*a*) that a dispute may be submitted to the courts only *before,* but *not after,* submission to the Adjustment Board, or, on the other hand, (*b*) that a dispute over which the Adjustment Board has authority may not be submitted to the courts at all except in a proceeding brought under Section 3 First (p). Still it would follow that on neither of these assumptions would it be a proper ground for dismissing this proceeding that there is no longer a live and active controversy or that the case has become moot.

Let it be assumed in the first place that the view of the majority below is correct and that, although the employes are free to resort to the courts in the first instance, under the *Moore* decision, nevertheless after submission of the

dispute to the Board their right to resort to the courts except in a Section 3 First (p) proceeding is at least suspended for a period of two years following the issuance of an award in their favor. In that event, as already shown (pp. 197-202 above), neither the employes nor the employer is now precluded from access to the courts because the two-year period has now expired and the bar interposed thereby has been lifted. Therefore a live and active controversy now exists, which the employes may at any time take into court, and which accordingly constitutes a proper basis for a declaratory judgment. It follows that, on this view, the case cannot properly be dismissed as moot.

In the second place, let it be supposed that the extreme view is taken and it is held that resort to the courts by the employes as well as by the employer is barred altogether and at all times, except in a Section 3 First (p) proceeding. This view, which would of course require the overruling of the *Moore* decision, has been shown to be wholly untenable and without foundation in the Act (pp. 24-81 above). But even if it were accepted, still the present case could not properly be dismissed on the ground that it is moot. Even on this extreme view, and even though the two-year limitation period has expired, there is nevertheless nothing to prevent the employes from going back to the Board and obtaining a new award with respect to the practice here in question, *i. e.*, the practice, still continuing at petitioner's station, of using road engines manned by road crews to move trains of empty cars between the storage yard and the station. The fact that the employes still have this opportunity of obtaining a new award with respect to the same practice and of bringing suit under Section 3 First (p) to make effective the rights declared in the new award is sufficient to make it clear that the controversy at issue in the present proceeding is still a live and active one and the case is not moot, even

though on the extreme view now under discussion the employer would not be permitted to bring the present suit, because of the other assumptions upon which that extreme view is founded.

It must be remembered that the present suit is not a suit to recover damages alleged to have resulted from the performance of particular acts on a particular day or days. If it were that kind of a suit, and if the statutory period of limitation applicable to it had expired, the suit could properly be dismissed on that ground. But the present suit is not that kind of a suit. It is a suit to have a judicial declaration as to the rights and obligations of the parties with respect to a *continuing* practice, one which has been going on at petitioner's station for many years and is still going on and will in all probability continue in the future unless petitioner is required—by judicial order or by economic pressure—to change it. If respondents are correct in their contention that this practice at petitioner's station constitutes a violation of the contract between petitioner and respondents, then such violations have been and are occurring every day. Accordingly, the dispute between petitioner and respondents is a continuing one and is still actively in existence, and it is therefore open to the employes to submit the dispute again to the Adjustment Board and obtain a new award on which a suit under Section 3 First (p) could be based. It follows that, apart from the assumptions as to the intent of the Railway Labor Act, on which this extreme view is founded, and which would bar the present proceeding, the reasons for permitting the present proceeding to go forward to a declaratory judgment would still exist, because the controversy is still a live one, and the dangers with which the carrier is confronted (see pp. 113-23 above), as a result of permitting such a dispute as this one to continue without being judicially determined—as it never would be if a proceeding like the one at bar were not permitted to go forward—are equally present.

Thus, it would be a vain thing for this Court to dismiss the present case on the ground that the controversy had ceased to be active or that the case had become moot. The controversy between the parties is still a live and active one, and, as shown above, whatever theory may be adopted as to the proper construction to be given Section 3 First (p) of the Act, the way is still open for the employes to seek relief, in some form of proceeding, for the alleged continuing violation of their contract, and meanwhile to hold this possibility as a club over the carrier's head, which, together with the economic pressure that the employes are capable of bringing to bear, can be used to compel the carrier to yield to their contention without a judicial determination of the rights and obligations of the parties, unless a declaratory judgment is permitted.

The conclusion to be drawn from all that has been said above is that the answer to this Court's third question must be that the expiration of the two-year period of limitation prescribed in Section 3 First (q) for suits brought under Section 3 First (p) of the Act has no effect whatever in restricting the right of either party to the dispute to obtain a determination of it in the courts, other than the fact that a proceeding brought by the employes under Section 3 First (p) predicated upon the Board's award of October 24, 1938, would now be barred. On the contrary, so far from having a restrictive effect, the expiration of the two-year period should actually operate to permit a proceeding like the present one now to go forward, even if the contention be accepted that it could not have gone forward during the two-year period.

SECTION V.

(Answer to the Court's Fourth Question.)

THE WORDS "FINAL AND BINDING" IN SECTION 3 FIRST (m) OF THE RAILWAY LABOR ACT CANNOT, CONSISTENTLY WITH OTHER PROVISIONS OF THE ACT, BE CONSTRUED AS HAVING ANY RESTRICTIVE EFFECT UPON THE RIGHT OF EITHER PARTY TO THE DISPUTE TO RESORT TO THE COURTS OR UPON THE SCOPE OF JUDICIAL CONSIDERATION OF THE DISPUTE EITHER DURING THE TWO-YEAR PERIOD OF LIMITATION PRESCRIBED BY SECTION 3 FIRST (q) FOR PROCEEDINGS UNDER SECTION 3 FIRST (p) OR AFTER THE EXPIRATION OF THAT PERIOD.

The fourth question put by the Court in its order for re-argument is as follows:

> "The effect of the words 'final and conclusive' in Section 3 First (m) upon the right to resort to the courts and upon the scope of judicial review, (*a*) during the two-year period, and (*b*) after expiration of the two-year period."

As pointed out above (p. 20), the phrase which the Court apparently had in mind in formulating this question appears in the Act as "final and binding" and not as "final and conclusive." The relevant portion of Section 3 First (m) of the Act is as follows:

> "• • • the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

What alternatives are presented as to the construction of the phrase "final and binding" as used in this context?

Three possible constructions of the phrase suggest themselves: *first*, it might conceivably be construed to mean—although there is no substantial basis for such a construction—that an award of the Board other than a money award should preclude altogether resort to the courts by either party with respect to the issues considered and determined by the Board, and that the courts are without authority to consider anew those issues in any respect; or, *second*, the phrase "final and binding" might possibly be construed to mean—although again there is no substantial basis for such a construction—that, while resort to the courts was not excluded and the courts were not altogether prohibited from considering the issues determined by the Board, nevertheless the phrase was intended to limit in some way the scope of judicial consideration with respect to the issues involved in the award, as, for example, by confining it to a consideration solely of questions of law, so that the award of the Board would be considered "final and binding" as to questions of fact; or, *third*, the phrase may have been intended to mean that the award should be considered "final and binding" in any further proceedings before the Board and unless the award should become the subject of judicial consideration in a proper proceeding in court and should be judicially pronounced incorrect or invalid in such a proceeding. Examination of these three alternative constructions will show that neither the first nor the second suggested alternative is tenable, and that the third suggested construction is the one which, in view of other provisions of the Act, can be accepted consistently with the other provisions of the Act. Furthermore, it will be shown that the phrase "final and binding" cannot be construed as precluding resort to the courts or limiting the scope of judicial consideration with respect to an award of the Board, regardless of whether or not the two-year period of limitation following the date of the award has expired.

A. The Phrase "Final and Binding" Cannot, Consistently With Other Provisions of the Railway Labor Act, Be Construed as Precluding Altogether Resort to the Courts for Judicial Consideration and Determination with Respect to the Issues Involved in an Award of the Board, Or as Limiting Such Resort To Proceedings Brought by the Employes Under Section 3 First (p) of the Act.

The first possible construction which the phrase "final and binding" might conceivably be given is that an award of the Board must be regarded as the very last word of any tribunal, with respect to the issues determined by the Board in making the award, and that resort to the courts for a judicial consideration and determination with respect to those issues is absolutely precluded. Apart from constitutional objections to a construction which would give an award of the Board such complete and absolute finality (see pp. 238-44 below), it is obvious that the phrase could not have been intended by Congress to have such a meaning, in view of other provisions of the Act. For example, Congress has specifically provided, in Section 3 First (p), a means whereby at least the employes may obtain a judicial re-examination and determination of the issues involved in the Board's award. If the phrase "final and binding" were intended to mean that the issues determined by the Board in making the award were not open to judicial consideration of any kind, then, in order to be consistent with the provisions of Section 3 First (p), the phrase in Section 3 First (m) should have read "final and binding except in a proceeding brought under Section 3 First (p)." But the phrase "final and binding," as it is actually used in Section 3 First (m), is not thus qualified, so that if "final and binding" means, "exclusive of judicial consideration of the issues involved," then there is a serious inconsistency between the use of that phrase in Section 3 First (m) and the provisions of Section 3 First (p). Clearly a construction which would lead to such an inconsistency is untenable.*

*See also the discussion at pp. 139-42 above.

In fact, respondents expressly admitted in their brief in the District Court below the untenability of the construction here being considered. In that brief respondents, after quoting the relevant language of Section 3 First (m), said (Defendants' Memorandum Brief, p. 34; R. 100):

> "From other sections of the Act, however, it is apparent that the 'finality' given to the awards of the Board is *an administrative finality only. There is no intention of attempting to preclude a judicial review.*" (Emphasis supplied.)

Thus, respondents expressly conceded in that brief that the phrase "final and binding" is not to be construed as intended to exclude resort to the courts. However, that concession on the part of respondents was retracted in their original brief in this Court, wherein they took the position that "final and binding" meant that awards of the Board should be regarded as final "unless set aside in the course of proceedings specifically authorized for the purpose of their review" (Respondents' Brief in Supreme Court, pp. 42, 55). Thus in that brief respondents contended that "final and binding" meant that an award was final in the sense that it excluded resort to the courts, except in a Section 3 First (p) proceeding. In that way respondents would construe "final and binding" so as to avoid inconsistency with Section 3 First (p) and yet as excluding the employer from a right of access to the courts, by supposing that "final and binding" indicated an intent to exclude resort to the courts by the employer, while the remedy under Section 3 First (p) remained available to the employes. Respondents in their brief then relied on that construction of the phrase "final and binding" as substantiating their position that Section 3 First (p) proceedings were intended by Congress to be exclusive of all other types of proceedings to obtain judi-

cial consideration of issues involved in an award of the Board.

But this construction of the phrase is clearly untenable, for two reasons. In the first place, it obviously assumes the very point to be proved, namely, that the Section 3 First (p) type of proceeding was intended by Congress to be exclusive of all other proceedings to obtain a judicial consideration of the issues involved in an award of the Board. In other words, to impute to Congress the intent that an award shall be final and binding except in a Section 3 First (p) proceeding is to assume that Congress intended such proceedings to be exclusive. Thus, respondents first assume what they are trying to prove, viz., that the Section 3 First (p) type of proceeding is exclusive, and then they invoke the aid of that assumption to construe "final and binding" as meaning that awards of the Board are final in all proceedings other than in Section 3 First (p) proceedings. Moreover, having thus established to their satisfaction a construction of the phrase "final and binding," respondents in their brief (pp. 41-42) then proceed to rely upon that construction in order to prove the basic assumption on which that construction rests, namely, that Section 3 First (p) proceedings were intended by Congress to be exclusive. This is a conspicuous example of the circular reasoning which pervades their whole argument.

In the second place, construction of the phrase "final and binding" as meaning that an award of the Board is final and not subject to judicial consideration of the issues involved therein except in a Section 3 First (p) proceeding is plainly contrary to the express language of the Act. Such a construction would necessarily carry with it the consequence that awards of the Board are "final and binding" except when the employes choose to treat them as not being "final and binding," by bringing a Section 3 First (p) proceeding. This inevitably follows from the fact that Section 3 First (p) proceedings can be brought

only upon the initiative of the employes, so that, on this construction, it would lie wholly within the discretion of the employes to determine whether or not an award is to be given a "final and binding" effect. The obvious result of such a construction would be that an award of the Board would be final with respect to one of the parties to the dispute, namely, the employer, but would not be final with respect to the other party to the dispute, the employes, who could at any time within the limitation period take action by bringing a Section 3 First (p) proceeding which would result in the award being subject to challenge and might lead to its being modified or set aside. But this is clearly contrary to the language of Section 3 First (m). The language of that section is that awards of the Board "shall be final and binding *upon both parties*" (Emphasis supplied). A construction of the Act which treats an award of the Board as "final and binding" with respect to one of the parties but not with respect to the other obviously disregards this language and gives an award the effect of being final and binding with respect to one of the parties alone.

Another possible modification of the view that the phrase "final and binding" is intended to preclude resort to the courts should be considered. It might conceivably be contended that Section 3 First (m) and Section 3 First (p) of the Act could be harmonized, and still be construed as precluding resort to the courts in a proceeding like the present one, by supposing that the provision in Section 3 First (m), to the effect that "awards shall be final and binding * * * except in so far as they shall contain a money award," means that Section 3 First (p) proceedings are available to employes only with respect to money awards. But such a construction would be clearly untenable, in view of the language of Section 3 First (p) itself. Section 3 First (p) expressly states that, in any case where "a carrier does not comply with *an order*" of a division of the Adjustment Board, pro-

ceedings under that section may be brought by "the petitioner, or *any person for whose benefit such order* was made" (Emphasis supplied). Thus, the language of Section 3 First (p) plainly indicates that proceedings thereunder are available with respect to *any* order which the carrier in question does not obey, the only limitation being that the proceeding may be brought only by "the petitioner"—*i. e.*, the claimant before the Board—"or by any person *for whose benefit*" the order was made. To construe this provision as meaning that such proceedings are available only to persons for whose benefit an order based on a money award has been made is to read into the section language which is not there and which is inconsistent with the language that is there.

Another provision in Section 3 First (p) which makes it plain that that section was not intended to be confined to suits involving money awards is found in the last sentence of Section 3 First (p). That sentence is as follows:

> "The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, *by writ of mandamus* or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (Emphasis supplied.)

Thus, Section 3 First (p) contemplates that the order of the Board which is sought to be made effective in a suit brought under that section may be such an order as can be appropriately enforced by a *writ of mandamus*. Obviously this would not be the case if it were the intent to confine suits under Section 3 First (p) to cases where the order merely directed the payment of money, in compliance with a money award, since *mandamus* is not the appropriate remedy to enforce an order for the payment of money, but is rather a remedy to be invoked where the order requires some affirmative change in conduct or practice.

In view of these provisions of Section 3 First (p), the phrase "final and binding • • • except in so far as they shall contain a money award" cannot be construed as limiting Section 3 First (p) to suits involving money awards.

From these considerations it follows that the phrase "final and binding" is not to be construed as manifesting a Congressional intent that resort to the courts for judicial consideration of the issues determined by the Board should be barred altogether, or that it should be barred except in a Section 3 First (p) proceeding, or that the latter type of proceeding is available only with respect to money awards. The next question therefore is whether or not that phrase is to be taken as indicating a Congressional intent that the scope of such judicial consideration should be limited in some undefined way.

B. The Phrase "Final and Binding" Cannot, Consistently With Other Provisions of the Railway Labor Act, Be Construed as Limiting the Scope of Judicial Consideration With Respect to the Issues Involved in an Award of the Board.

The second possible construction which the phrase "final and binding" might conceivably be given is that, although it is not intended to preclude altogether resort to the courts for judicial consideration and determination with respect to the issues involved in an award of the Board, nevertheless it is intended to limit the scope of such judicial consideration. If this is the proper meaning of the phrase, then there is no indication on the face of the Act as to the extent to which or the manner in which the scope of such judicial consideration should be thus limited. However, it might possibly be suggested, on so-called general principles of administrative law, that an award of the Board should be given an absolute finality with respect to issues of fact, thereby limiting the scope of

judicial consideration to questions of law, such as, for example, questions concerning the jurisdiction of the Board, the interpretation of statutory provisions, constitutional questions, and other similar questions of a purely legal character.

But this supposition as to the proper construction of the phrase "final and binding" not only has no foundation in the Act but is plainly inconsistent with other provisions of the Act. If, as this supposition assumes, the award of the Board is to be regarded as absolutely and conclusively final with respect to questions of fact determined by the Board, then all re-examination or re-consideration of such questions of fact in a judicial proceeding would be precluded. But the provisions of Section 3 First (p) make it clear that such was not the intent of Congress. Section 3 First (p) expressly provides that in a suit brought under that section the "findings and order" of the Board shall be "*prima facie* evidence of the facts therein stated." Thus, the effect of the "findings" or award of the Board is limited to constituting only *prima facie* evidence of the facts, which obviously means that such findings or award are subject to rebuttal in the judicial proceeding by evidence showing contrary or inconsistent or different facts. In other words, the clear conclusion to be drawn from the provision of Section 3 First (p) limiting the effect of the Board's award to that of "*prima facie* evidence of the facts" is that the issues of fact determined by the Board are subject to re-examination in the judicial proceeding and that the *prima facie* effect of the award may be rebutted or set aside altogether upon a showing by sufficient evidence that the issues of fact had been incorrectly determined by the Board.

Clearly, therefore, the phrase "final and binding" cannot, consistently with other provisions of the Act, be regarded as intended to limit the scope of judicial consideration and determination with respect to the issues involved in an award of the Board.

C. The Phrase "Final and Binding" Can Properly Be Construed Only as Meaning That an Award of the Board is Final and Binding In Any Further Proceeding Before the Board and Unless It Should be Judicially Pronounced Incorrect or Invalid in a Proper Court Proceeding.

Since, as pointed out above, the phrase "final and binding" cannot properly be construed as intended either to preclude altogether resort to the courts or to limit the scope of judicial consideration with respect to the issues involved in an award of the Board, there remains only the third alternative construction, namely, that an award of the Board shall be considered final and binding in any further proceedings before the Board, and unless it should become the subject of judicial consideration in a proper proceeding in court and should be judicially pronounced incorrect or invalid in such a proceeding. This is the construction which petitioner submits is the correct one, and which respondents likewise thought to be the correct one in making the statement quoted above (p. 213) from their brief in the District Court below. In that brief they said (R. 100): "* * * it is apparent that the 'finality' given to the awards of the Board is an administrative finality only." This can mean only that respondents conceded that the effect of the phrase "final and binding" is limited to the effect to be given an award in other proceedings before the Board and that the phrase is not intended to indicate that the award has any such finality as to preclude a judicial proceeding properly brought to consider and determine the issues involved in the award.

This construction of the phrase "final and binding" has support in the decided cases. In *Cook* v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810 (S. D. Iowa, 1936), an employe was permitted to recover damages in a suit under Section 3 First (p), the employe having first obtained an award from the Adjustment Board sustaining his claim. Among other contentions made by defendant, it was

argued that the provision in Section 3 First (m) to the effect that awards of the Board should be "final and binding upon both parties" deprived defendant of its constitutional rights, including the right of due process. In response to this contention the court said (pp. 813-14):

> "It is unnecessary to determine whether or not this might be a depriving of due process in certain cases, but here certainly the Des Moines Union is not deprived of any constitutional rights. *The purport of the act may be to provide that the award made by an Adjustment Board shall be final so long as it is not attempted to be enforced. No provision is made in the act for the enforcement of any award or decision of the Adjustment Board,* and therefore there is no deprivation by the railway company of any rights unless and until the suit is filed in the District Court of the United States for its enforcement. When this is done it becomes an action at law with the right of a jury. *The entire case is open for trial as a law action on the original suit.*" (Emphasis supplied.)

Thus, the view taken by the court in that case of the proper interpretation of the phrase "final and binding" was that that phrase was to be regarded as making an award of the Board (except in so far as it was a money award) binding upon the parties but only unless the award came properly before a court for judicial consideration and determination with respect to the issues involved in the award, and that when those issues were adequately presented for judicial consideration the award of the Board had no effect in precluding or limiting the court's consideration of them.*

That view is further substantiated by, and is in fact the only construction consistent with, the cases holding

* The view thus taken by the court in the *Cook* case was cited with apparent approval by Spencer in his article on the Adjustment Board, referred to above (see Compilation, p. 204 of Appendix thereto).

that the existence of an award of the Board does not foreclose a court having proper jurisdiction from declaring the award void or re-examining the issues involved in the award.* Indeed, this is the only construction of the phrase "final and binding" which is consistent with the view, accepted by all authorities and admitted by respondents, that an award of the Board does not in and of itself constitute a cause of action and is not self-enforcing or enforceable as such (pp. 27-30 above). Since, as already pointed out (p. 218), an award of the Board is given by the Act no greater status or effect than that of constituting *prima facie* evidence of the facts, it is plain that the award was not intended to be "final and binding" in any sense which would preclude or restrict a court's consideration and examination of the basic issues involved. Obviously, if an award of the Board amounts to no more than *prima facie* evidence, and if a court is therefore free to re-examine the issues involved and to reach its own conclusion with respect to both the facts and the law, the award is in no sense "final and binding" upon the court, and the application of that phrase must therefore be limited to the status of the award prior to such time as it may be judicially considered and corrected in a proper court proceeding.

Thus, this construction of the phrase "final and binding" is the only one which is consistent with other provisions of the Act, according to their plain meaning and the construction placed upon them by the decided cases. Moreover, it is a construction which gives full sense and effect to the phrase in question, especially when considered in its entirety. That phrase is that awards shall be "final and binding upon both parties to the dispute except in so far as they shall contain a money

* See, for example, *Nord* v. *Griffin*, *supra* (p. 26 above), *Stephenson* v. *N. O. & N. E. Co.*, *supra* (p. 30 above), *Lane* v. *Union Terminal Co.*, *supra* (p. 30 above), *McDermott* v. *N. Y. Cent. R. Co.*, *supra* (p. 30 above), *System Federation No. 59, etc.*, v. *Louisiana & A. Ry. Co.*, 30 F. Supp. 909, 912 (W. D. La., 1940), affirmed, 32 F. Supp. 89, 119 F. (2d) 509.

award." It has been pointed out above (p. 215) that the words "upon both parties to the dispute" are not given effect if the phrase is construed as excluding the employer from resort to the courts, while the construction here being considered does give full effect to those words. Similarly, the appropriateness of this construction becomes clear when the distinction drawn between money awards and non-money awards is considered. It seems entirely reasonable to regard an award which determines the propriety of an operating practice as "final and binding" in other proceedings before the Board between the same parties involving the same practice under the same contract and the same operating conditions. But it might not be reasonable to treat a money award as "final and binding" in other proceedings before the Board involving other claims, even though the claims might grow out of the same or similar operating practices. For example, in the present case it might properly be claimed that, if the question of the propriety of the operating practice here involved—namely, the practice at petitioner's station of using road engines to move empty passenger cars between the station and the storage yard—came before the Adjustment Board in another proceeding, the Board's prior decision with regard to that practice should, in the absence of a change in the basic relations between the parties or in their contract, be treated as "final and binding." However, the award of the Board, in so far as it sustained the claims of respondents for money damages for petitioner's failure to permit them to do the work in question on particular days, obviously could not be treated as "final and binding" in another proceeding involving the claims of the same employes for failure to permit them to do the work on other days, even though the claims grew out of the same operating practices. Clearly, the distinction drawn in the phrase in question, between awards of the Board in so far as they involve non-money awards and in so far as they involve money awards, is

a sensible and reasonable one, and emphasizes the appropriateness of the construction here being considered, viz., that the words "final and binding" mean, final in other proceedings before the Adjustment Board and until the award has become the proper subject of judicial consideration and has been judicially pronounced incorrect or invalid.

The fact that an administrative determination may properly be regarded as "binding" and yet as not precluding a judicial examination and determination of the rights of the parties to the extent needed adequately to protect those rights is shown by the decision of this Court in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938). There this Court, speaking through Mr. Chief Justice Hughes, said, with regard to a determination by the Interstate Commerce Commission that a railroad did not constitute an interurban electric railway within the meaning of the Railway Labor Act (p. 182 of 305 U. S.):

> "• • • in view of the nature and purpose of the proceeding we must regard the determination as *binding* on both the carrier and the Mediation Board." (Emphasis supplied.)

But, although this Court thus held that the Commission's determination was "binding" upon the parties, it nevertheless accorded to the railroad a judicial review of that determination, even though no statutory proceeding for such review was available. The effect of that decision therefore is that judicial review is not precluded by the fact that the administrative determination may properly be regarded as "binding" upon the parties.

A different view with respect to the proper construction to be given the phrase "final and binding" appears to be suggested by some of the language in the opinion of a California District Court of Appeals, in the case of *Austin* v. *Southern Pacific Co.*, 50 Cal. App. (2d) 292, 123

P. (2d) 39 (March 3, 1942), a case cited by respondents in their brief in this Court on the original argument. In that case the plaintiff, a dining car employe, sought restoration of alleged seniority rights, damages for breach of his contract governing those rights, and an injunction against the union to restrain it from interfering with the plaintiff's claimed seniority status. The complaint was dismissed on demurrer, the principal ground of the decision being that, although the complaint had been amended several times and plaintiff's counsel refused to amend it further, it failed to allege sufficient facts showing a substantive basis, contractual or otherwise, for the claimed seniority rights. Purely by way of dictum, the court added a suggestion that the plaintiff, whose claim had been submitted to and rejected by the Adjustment Board, had thereby made his "election" and so was not free to seek in the courts relief which had been denied him by the Adjustment Board. In making that suggestion, the California Court referred to the decision of this Court in the *Moore* case and also to *Adams* v. *New York, C. & St. L. R. Co.*, 121 F. (2d) 808 (C. C. A. 7th, 1941), and then went on to say (p. 299 of 50 Cal. App. (2d)):

> "The appellant, according to the face of his complaint, made his election and invoked the board's jurisdiction. Subdivision (m) of the last-mentioned section of the act provides '• • • the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award'."

There was no further comment by the court on this latter provision of the Act.

Obviously, no weight can be accorded this decision on the question of the proper construction to be given the phrase "final and binding," in the connection in which it is relevant in the case at bar, for several reasons. In

the first place, the ground of the court's decision was the plaintiff's failure to allege a contractual or other substantive basis for his claimed seniority rights, so that the complaint failed to state a cause of action. Therefore, the court's statement with respect to "election" and the phrase "final and binding" was purely dictum. In the second place, there is no discussion in the court's opinion of its view as to the proper construction to be placed on the phrase "final and binding," which is simply cited in passing, without any comment. In the third place, with regard to the suggestion that the plaintiff had made his "election," the court bases this suggestion entirely on the decision of this Court in the *Moore* case and on the decision in the *Adams* case, *supra*. But of course this Court did not decide in the *Moore* case that a plaintiff who had chosen to invoke the statutory method for "adjustment" of his claim was thereafter barred from seeking relief in the courts in other than statutory proceedings. This Court said in the *Moore* case that the employe could elect either to submit his claim to the Adjustment Board or resort to the courts in the first instance, but it did not say that an employe whose claim had been rejected by the Board was thereafter barred from access to the courts, and, as shown above (pp. 62-64, 167-72), such a holding would be inconsistent with the reasoning in the opinion in that case. Nor was that proposition established in the *Adams* case. It will be recalled that in that case the District Court had held that an employe was not entitled to resort to the courts in the first instance where the adjustment machinery provided by the Railway Labor Act was available and applicable to his dispute, but this was reversed by the Circuit Court of Appeals on the authority of this Court's decision in the *Moore* case. All that the Circuit Court of Appeals said, in making that decision in the *Adams* case, was that "the employees' action may be brought, at their election, either in a court, or settled by the administrative remedies

prescribed by said Act." Thus, the Circuit Court of Appeals in the *Adams* case ultimately permitted the employe, who had not gone to the Board at all, to proceed with his suit, and it neither held nor said in its opinion that an employe who first submitted his dispute to the Board would if rejected by the Board be thereafter barred from relief in the courts.

Plainly, therefore, the California court in the *Austin* case could derive no support whatever from either the decision of this Court in the *Moore* case or the decision of the Circuit Court of Appeals in the *Adams* case for its dictum that an employe whose claim had been rejected by the Adjustment Board was "bound" thereby and could not seek relief in the courts. Moreover, not only is that dictum without support either in the cases or in the Act, but it is contrary to other decided cases, which, as pointed out above (pp. 167-70), have held that an employe whose claim has been rejected by the Board is not barred from thereafter seeking relief in a proper court.

Another decision which should be noted is the recent decision of a Federal District Court of Missouri in the case of *Berryman* v. *Pullman Co.*, not reported (W. D. Mo., November 6, 1942). In that case a negro Pullman porter who had been discharged had presented his claim to the Adjustment Board, which had denied the claim. Thereafter he brought suit in the Federal District Court, alleging diversity of citizenship and seeking recovery of wages and reinstatement as an employe of the defendant. In granting summary judgment for the defendant, the District Court referred to the phrase "final and binding," pointed out that the award of the Board in question contained no money award, and concluded that it was not open to the court to reconsider the action of the Adjustment Board. This cursory reasoning of the court, in a very brief opinion which enters into no analysis of the problem, is so clearly contrary to the many considerations set forth above and to the other decided cases, to

the effect that the phrase "final and binding" cannot be construed as precluding consideration by a court of the issues involved in an award, that it must be rejected as hasty and superficial.

However, even if the result reached by the court in that case should be accepted as correct, still it would not lead to a dismissal of the case at bar. In the *Berryman* case, as in the *Austin* case, the plaintiff had voluntarily chosen to submit his claim to the Adjustment Board and it had been rejected by that Board. As stated by the court in that case, "He voluntarily submitted the dispute to the Adjustment Board, got its decision and cannot now ignore it." Thus, the result reached in that case might conceivably be sustained on the theory of an election of remedies and estoppel to change to another remedy after the first remedy has failed. As pointed out above (pp. 167-70), petitioner believes such a view to be unsound and takes the position that the sounder view is that represented by the cases holding that an employe whose claim has been rejected by the Adjustment Board is not thereby barred from submitting his claim to a proper court having jurisdiction thereof. But even if it should be held that those cases are wrong and that the result reached in the *Berryman* case is right, nevertheless it would not follow that petitioner is barred in the present case, since there has been no choice or election of remedies on the part of petitioner here. For the reasons set forth in Section II of this brief (pp. 82-92 above), petitioner had no alternative except to appear before the Adjustment Board and defend itself as best it could, in response to the unilateral submission of the dispute to the Board by the employes. Accordingly, there is no basis whatever for invoking against petitioner in this case any doctrine of estoppel or waiver based on election of remedies, and therefore the result reached in the *Berryman* case, even if accepted as correct, cannot be considered as a precedent against the maintenance of the present suit.*

* See also discussion above at pp. 171-72 and 188-91.

It follows from what has been said that the only construction of the phrase "final and binding" which is consistent with other provisions of the Railway Labor Act, and the construction which finds the most support in the decided cases, is that which is here being considered, namely, that an award of the Board is "final and binding" only in proceedings before the Board and unless it should become the proper subject of judicial consideration and correction. Moreover, this construction of the phrase "final and binding" is the only one which is in harmony with the view, shown above to be the correct one (pp. 156-66), of the function of the Adjustment Board as being essentially one of adjustment and compromise, rather than adjudication of legal rights, and with the view of the nature of an award of the Board as representing a suggested compromise or settlement which may go so far as to depart substantially from the legal rights and obligations of the parties as established in their contract. If, as has been demonstrated, it was the intent of Congress, as manifested in the Railway Labor Act considered as a whole, that the Adjustment Board should function in that manner and that its awards should be regarded as suggested settlements or compromises rather than as judicial or quasi-judicial determinations of the legal rights of the parties, then, for the reasons already set forth, Congress certainly cannot be supposed to have intended, in its use of the words "final and binding" in Section 3 First (m), that the mere existence of such an award should foreclose or restrict the courts in the exercise of their proper function of considering and determining the legal rights and obligations of the parties under their contract.

Even if the phrase "final and binding" could properly be construed to exclude resort to the courts or limit the scope of judicial consideration, still it could not be given the effect of barring the present proceeding, because Section 3 First (m) expressly provides that an award shall

not have a "final and binding" effect in so far as it involves a money award, and the award of October 24, 1938, in the present proceeding did involve a money award, since the claims which it sustained were claims for money. That was manifested by the fact that the issuance of the award was soon followed by the presentation by respondents of claims for the sums of money which they alleged they would have earned had they been permitted to do the work in question (see p. 10 above). Accordingly, even if the words "final and binding" were construed so as to bar judicial consideration of the issues involved in a non-money award, the existence of the award of October 24, 1938, in the present case could not on that basis be construed as preventing the present proceeding from going forward, because it involved a money award. But, for the reasons already indicated, the phrase "final and binding" cannot be construed as either excluding or limiting judicial consideration of the issues involved in an award, whether it is a money award or a non-money award.

D. The Phrase "Final and Binding" Can Have No Effect Whatever Upon the Rights of the Parties To the Dispute in the Case of an Award With Respect to Which the Two-Year Limitation Has Expired.

It has been shown above that, in view of the language of the Act, and especially the provisions of Section 3 First (p), an award of the Board cannot be regarded as "final and binding" in the sense that it either precludes resort to the courts or limits the scope of judicial consideration with respect to the issues involved in the award. This is of course true during the two-year period following the effective date of the award, since, as pointed out above, a Section 3 First (p) proceeding is available during that period and the only status which an award has in that

proceeding is as mere *prima facie* evidence of the facts, so that the award can not be considered as precluding resort to the courts or as limiting the scope of the court's consideration of the facts or the law in a Section 3 First (p) proceeding brought during the two-year period.

A fortiori an award of the Board cannot be considered "final and binding" in the sense of precluding resort to the courts or limiting the scope of judicial consideration after the expiration of a period of two years from the date of the award. Since the only status which an award of the Board has under the Act is as "*prima facie* evidence of the facts" in a Section 3 First (p) proceeding, and since such a proceeding is barred after the expiration of two years from the date of the award (see pp. 195-97 above), it follows that an award of the Board would have no effect whatever in any judicial proceeding brought after the expiration of the two-year period during which a suit under Section 3 First (p) could be brought to make effective rights declared in the award. An award is not legally self-enforcing and does not in and of itself create any legal duty of obedience on the part of the party against whom it is entered (see pp. 157-66 above), and therefore it has only the effect expressly attributed to it by Section 3 First (p). That is the only type of suit in which such an award can be made effective, and its effect therein is expressly limited to that conferred upon it by the statute. In any other type of proceeding brought with respect to the same issues as those involved in the award, such as an action for damages or an injunction or declaratory judgment proceeding, an award of the Board would not have even the statutory status of being *prima facie* evidence, since it has that status in Section 3 First (p) proceedings only by virtue of the provisions to that effect in that section. Thus, an award of the Board would as such have no status or effect of any kind in any other proceeding than a Section 3 First (p) proceeding.

Clearly, therefore, an award of the Board would have no status or effect whatever in any judicial proceeding brought after the expiration of a period of two years following its issuance, since the only proceeding in which it could have any status or effect at any time, namely, a Section 3 First (p) proceeding, is no longer available with respect to that award. This does not of course mean that the present suit should not be permitted to go forward to a declaratory judgment. It has been pointed out above (pp. 202-9) that there still exists a live and active controversy between petitioner and respondents, with regard to their contract rights, and therefore the suit is a proper one for a declaratory judgment, even though a suit under Section 3 First (p) is no longer available.

It follows from these considerations that the phrase "final and binding" must be construed as meaning only that an award of the Board is binding unless it is judicially considered and corrected, and not as meaning that resort to the courts is precluded or the scope of a court's consideration is restricted by the existence of such an award; and, further, that this is true even in a Section 3 First (p) proceeding brought within the two-year period of limitation, so that *a fortiori* an award has no preclusive or restrictive effect in a proceeding brought after the expiration of two years from the date of issuance of the award.

SECTION VI.

TO READ INTO THE RAILWAY LABOR ACT BY IMPLICATION A CONSTRUCTION WHICH WOULD PREVENT PETITIONER FROM MAINTAINING THIS SUIT WOULD VIOLATE ELEMENTARY PRINCIPLES OF PROCEDURAL FAIR PLAY WHICH HAVE ALWAYS BEEN RECOGNIZED AND APPLIED BY THIS COURT IN ITS DECISIONS, AND WOULD ALSO UNDERMINE THE PROCESS OF COLLECTIVE BARGAINING BY DEPRIVING THE CONTRACTS ARRIVED AT BY SUCH BARGAINING OF THEIR CHARACTER AND EFFECTIVENESS AS CONTRACTS AND WOULD REDUCE THEM TO MERE "SCRAPS OF PAPER."

A. To Hold That This Suit May not Be Maintained Would, as Respondents Themselves Contend, Vest Awards of the Adjustment Board, a Wholly Non-judicial Body, with "Practical Finality," Contrary to Basic Principles Frequently Announced and Applied in Decisions of This Court; and the Contention of Respondents That This Result is Permissible Because the Coercion Which Would Give Finality to the Awards is "Extra-Legal" and not "Legal" Coercion not Only Rests on an Unsound Distinction Which Substitutes Form for Substance, But is Inapplicable Here Because the Coercive Effect of Awards of the Adjustment Board is Made Possible by Provisions of the Railway Labor Act.

From the foregoing sections of this brief it is apparent that the ultimate issue in the case at bar is whether or not a prohibition against the present suit is to be read by implication into the Railway Labor Act because supposedly required by a technical argument which assumes the point to be proved. That argument, which supplied the form of words that the majority of the Court

of Appeals used to reach its decision below, comes down essentially to this: that the Act provides a statutory form of judicial review in Section 3 First (p); that this statutory form of judicial review, although practically never used by the employes in whose favor it was created, must nevertheless be held to be exclusive in order to preserve to them certain advantages which they do not value sufficiently to avail themselves of; and that the statutory proceeding, although it rests in the sole option of the employes to institute, and although admittedly the employes practically never use it, must nonetheless be held to afford a completely sufficient and adequate opportunity for judicial relief to the employer, since the coercion to which the employer is subjected unless such a statutory proceeding is brought is not "legal," but only what is called "extra-legal," coercion. (See pp. 100-91 above.)

That is the argument. Fundamentally it rests on the assumption that Congress intended the adjustment procedure to result in awards that would have a "practical finality" which they would lack if the controversy were subject to re-examination in the courts (pp. 148-49 above), and that Congress intended those awards, vested with such finality, to find their sanction, as respondents have said, in the economic pressure of powerful labor unions rather than through judicial process. Without this assumption the argument falls to the ground; and yet of course it is an assumption of the very point to be proved. The formalism of the argument which is advanced to sustain and at the same time to conceal this basic assumption is shown by the fact that, in the first place the argument frankly insists that the fact that Section 3 First (p) proceedings are not brought must be totally ignored, and falls back on the proposition that they are *legally capable of being brought, if the other party chooses;* and, in the second place, the argument with equal frankness ignores the "extra-legal" economic coercion to which the employer is subjected and takes refuge in the excuse that the em-

ployer may at least not be subjected to "legal" compulsion to obey the award save through the medium of a court.

If this formal argument should prevail, then it would obviously become possible to erect a completely non-judicial body like the Adjustment Board into what would be in effect a Supreme Court, merely by so drafting a statute as to leave to the beneficiary of such a body's decrees the option of whether to enforce them through the courts or else ignore the courts and enforce them by economic pressure, since the argument assumes that such a statutory option left to one party must be held in and of itself to shut the doors of the courts in the face of the other party to the controversy. Such a result provides an ingenious way of substituting primitive self-help for the processes of adjudication.

To this consequence of their position respondents make the only answer possible. They say in effect, what of it? And they support this answer by the purely formal and abstract argument that, if the beneficiary of an award of the Adjustment Board chooses not to enforce the award through judicial proceedings under Section 3 First (p), but through private means available to him, that is nobody's business but his own, and his adversary, though placed at an overwhelming disadvantage, has no more right to complain than a private debtor whose creditor refuses to bring suit and attempts to force payment of the debt by some informal or "extra-legal" means.

To this argument there are several answers:

The first is that here the question for decision is whether such a result must be deliberately read into the statute by implication where the statute plainly does not require it and is compatible with an opposite result. Even assuming for the sake of argument that such a result would have to be accepted if plainly indicated as the intent of Congress, should it be held to be the intent of Congress where there is no evidence to show such

intent? Clearly, a statute ought not to be construed to require such a result where it is not necessary.

Secondly, however much it may be true that there are instances where the law does not or cannot force the submission of a dispute to adjudication, this does not mean, as respondents' argument assumes, that it must be taken to be the policy of the law to favor a result which would affirmatively prevent controversies from being submitted to adjudication.

Thirdly and most importantly, the argument is defective in the significant respect that it ignores the decisive factual differences which distinguish a controversy between two private individuals, on the one hand, from a controversy, on the other hand, between an employer and a powerful labor organization which is equipped to use economic force, to the great inconvenience of the public which the employer is bound to serve. Even assuming for the purpose of argument that in the case of an ordinary controversy between man and man the law would look with indifference on whether or not the controversy is submitted to adjudication through judicial methods or is settled by private pressures, it is clear that from a factual standpoint there are important differences, which cannot properly be ignored, between such a controversy and one to which a powerful labor organization equipped to use economic force is a party. Surely a type of judicial reasoning which would reach its result by ignoring differences of this kind in favor of abstract analogies would mark a reversion to an obsolete judicial technique and would depart from the judicial approach which has made progress in the law possible and to which the employe above all owes most of his important rights.

No field of law more than labor law rests on recognition that important differences in fact should be taken into account and may lead to corresponding differences in legal results. Nearly all the basic rights of labor which have won the protection of the law have done so because

the law has recognized the important factual respects in which the employe stands in a different position from other persons. This recognition of fact differences is the basis of the right to strike, for example, and is the reason why strikes are not treated as unlawful boycotts and conspiracies *per se*. It is the reason why contracts of employment are not subject to specific performance and why it is constitutional for employes to be treated for many purposes as a special class. It is not too much to say that the whole body of labor law rests on the proposition that the law accords recognition to fact differences.

Since this is so, it is hardly appropriate for those who speak for employes and represent labor organizations to urge in this or any other case a reversion to judicial conceptions which treat dissimilar situations as alike and ignore differences of fact. If fact differences are accorded recognition by the law in cases where the result is to enlarge the rights of employes, there is no sound reason for ignoring them and resorting to legal abstractions in other cases merely because the result of recognizing them in those cases would be to limit some power that labor would like to have. It therefore seems clear in the case at bar that, in considering whether a statute should be so construed by implication as to subject the employer to economic pressure from a labor organization without the possibility of recourse to the courts, any conclusion that is reached should not be based on the assumption that the situation is simply on all fours with a mere private controversy between an individual debtor and an individual creditor, but recognition should be accorded to the important distinction that exists between the position of a debtor whose creditor merely fails to bring suit and an employer who, if no proceeding is brought by employes under Section 3 First (p), is inevitably placed in a position where it is subjected to labor-union pressure which it cannot successfully resist.

The body of our labor law rests on recognition of the

relative inferiority in bargaining position of the individual employe as compared with the industrial employer. It rests, in other words, on a recognition of relative positions of factual superiority and inferiority between two classes of parties. There is likewise a relationship of inferior and superior power as between a railroad and the organizations representing its employes, with respect to the exertion of so-called economic pressure. This relationship of inferior and superior capacity to exert pressure effectively is so obvious as to need no comment. A railroad today cannot afford to resist the demand of a labor organization powerful enough to cause the cessation of the railroad's public service. The situation is thus wholly different in fact from that of a debtor whose creditor merely fails to bring suit. The creditor is without other power of coercion; the labor organization is equipped to coerce.

This Court cannot ignore the fact, pointed out above (pp. 103-23), that every practical incentive operates upon a labor organization which has won an award for its members before the Adjustment Board to impel the organization to refrain from hazarding that award in a suit under Section 3 First (p), and to enforce it instead by the power which it so amply possesses of disrupting the service which the employer owes to the public. The risk of such disruption is one which the employer dare not take, and this is the plain and obvious explanation of why the instances of resistance have been so few. Accordingly, if the employer is to have no opportunity of judicial relief otherwise than through a suit brought by the employes under Section 3 First (p), and if a proceeding like the present one is not available to the employer, then because of the obvious relative positions of the employer and the labor organization the result must be that the employer will have to yield to the labor organization's demand without any judicial determination of the employer's rights.

There is another difference between the situation of a

debtor whose creditor merely refuses to bring suit and a railroad-employer whose employes decline to proceed under Section 3 First (p) and instead compel the employer by superior pressure to comply with an award of the Adjustment Board. In the latter case the failure to sue is not merely accompanied by effective and overwhelming compulsion, as is not true in the former, but the result is furthermore to give effect to a determination of a statutory non-judicial agency without affording the party against whom that determination is directed an opportunity for his day in court. In other words, a device is created for enforcing a non-judicial determination like that of the Adjustment Board without any opportunity for a judicial determination of the rights of the parties. A way is found for vesting a non-judicial decision with finality.

That this may not be done is settled by principles which this Court has repeatedly enunciated and applied in recent as well as in earlier decisions. Today it is still established law that when a legislature provides a statutory remedy against a non-judicial determination but leaves that remedy to the option of one party to the controversy and in the meantime exposes the other party to hazards and pressures which make effectively for compliance, the courts will provide judicial relief for the latter party in an appropriate proceeding, even though the statutory remedy is plainly and expressly intended to be exclusive: *Ex Parte Young*, 209 U. S. 123, 28 S. Ct. 441 (1908); *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 35 S. Ct. 214 (1915); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 40 S. Ct. 338 (1920).

Thus, in *Ex Parte Young, supra*, this Court, speaking through Mr. Justice Peckham, said (pp. 163 and 165):

> "It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction

in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

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"To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. *This risk the company ought not to be required to take."* (Emphasis supplied.)

Similarly, in *Oklahoma Operating Co.* v. *Love, supra,* a statute authorizing an administrative commission to fix rates for public utility service provided, as the only and admittedly exclusive method of judicial review, that a non-complying utility might be penalized by the commission for its disobedience, and such penalty order would be subject to judicial review in which the utility might challenge the legality of the rate order. A utility against which a rate order had been made, instead of waiting for the commission to institute penalty proceedings

against it, appealed directly to the courts for injunctive relief, and this Court, in holding that such relief should be granted, said, through Mr. Justice Brandeis (pp. 336-37 of 252 U. S.):

> "So it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. * * * By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is open to him by way of appeal on the whole record to the Supreme Court. *But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident.* * * * The penalty may apparently be imposed for each instance of violation of the order. * * * *Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements.*" (Emphasis supplied.)

It should be noted that the exclusive statutory procedure held inadequate in both the foregoing cases resembles the allegedly exclusive remedy available to petitioner under Section 3 First (p) of the Railway Labor Act in that in both instances the power to institute the judicial proceedings is placed solely in the hands of the other party to the controversy. In both instances the parties seeking judicial relief are powerless under the statute to take action themselves to set in motion the judicial machinery supposed to be available for their relief. To obtain judicial relief they must wait for the other party to act.

Their hands are tied; and in the interval they are subjected to hazards so great and cumulative that, from the judicial notice which will be taken of what can be expected of reasonable men, it is apparent that such men will prefer not to wait but to yield. Under such conditions the judicial remedy, which is apparently held out by the language of the law, is in substance and reality denied by the facts. It is an illusory and simulated remedy.

The basic principle underlying the decisions of this Court in the *Young* case, the *Wadley Southern* case, and the *Oklahoma Operating Co.* case is that, where a method of review provided by statute fails in fact to afford an adequate opportunity for a judicial determination of the rights of one of the parties, even though that method is plainly intended by the statute to be exclusive, the courts will nevertheless permit other and different procedure to be employed in order to assure to that party his day in court. A recent application of the same principle under somewhat different circumstances was made by this Court in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938).

That case involved a finding or declaratory order made by the Interstate Commerce Commission of a kind which had been held to be not reviewable under the three-judge court procedure provided by the Urgent Deficiencies Act (*Shannahan* v. *United States*, 303 U. S. 596, 58 S. Ct. 732 (1938)). No other review procedure was available by statute. Accordingly, the court held that the rights of the parties in the premises should be judicially determined through the general equity jurisdiction of the courts, since they were entitled to such a determination and it would otherwise be denied to them.

The same basic principle was again applied in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 59 S. Ct. 754 (1939). The suit in that case was brought in equity by the telephone company to determine whether or not the com-

pany was subject to the jurisdiction of the Federal Communications Commission, as it had been declared to be by an order of that Commission. The order of the Commission did not require the company to take any affirmative action but merely held it subject to the Commission's jurisdiction. The contention was advanced on behalf of the Commission that the order was not reviewable because it was "negative" in character and so came within the doctrine of *Procter & Gamble* v. *United States*, 225 U. S. 282, 32 S. Ct. 761 (1912), and cases following that decision, which held that so-called "negative" orders of administrative tribunals were not subject to judicial review. This Court, speaking through Mr. Justice Frankfurter, made a full and careful examination of the cases and reached the conclusion that the doctrine of non-reviewability of "negative" orders was unsound, and further that, where certain necessary conditions precedent were established, orders of administrative tribunals were generally reviewable. The conditions precedent required for access to the courts were stated to be (*a*) a case or controversy under Article III of the Constitution of the United States, (*b*) the conventional requisites of equity jurisdiction, and (*c*) the specific terms of the statute granting jurisdiction to the district courts.

An effort will doubtless be made by the respondents to distinguish the foregoing cases on the basis of the formal argument, above referred to, that in a situation like that presented by the case at bar the coercion through which the carrier may be compelled to comply with the Adjustment Board award, if denied access to the courts, is only an "extra-legal" coercion (see above, p. 233), whereas they will no doubt contend that in the cases above cited the challenged order, if immune from judicial re-examination, would have produced its damaging consequences through penalties imposed by law. In other words, to avoid the effect of the decisions in question they are again forced to take refuge in their conten-

tion that this Court should close its eyes to the actual compulsion which, as they themselves argue, would give to Adjustment Board awards an effect of "practical finality" if such a suit as the present one may not be maintained. Once again they can support their position only by resort to the contention that form should govern rather than substance.

Petitioner submits that form should not be permitted to override substance, especially where the principle at stake is as fundamental an element in procedural fair play as the one which is here involved. The principle that a non-judicial determination affecting private rights, and especially one involving contract rights, as in the case at bar, will not be allowed to have finality without an opportunity for re-examination of those rights in court is basic in our system of law as it has always hitherto been understood. In the words of Mr. Justice Brandeis (*St. Joseph Stock Yards* v. *United States*, 298 U. S. 38, 77, 84, 56 S. Ct. 720, 737, 740 (1936)):

> "• • • there must be the opportunity of presenting in an appropriate proceeding, *at some time, to some court*, every question of law raised, whatever the nature of the right invoked, or the status of him who claims it.
>
> • • • • • • •
>
> *"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied."* (Emphasis supplied.)

In view of the basic character of this principle, it clearly should make no difference whether the compulsion which, in disregard of that principle, gives finality to a non-judicial determination without opportunity of access to the courts consists of "legal" compulsion, operating through statutory penalties, or of "extra-legal" pressures

which derive their potency in fact from a construction of the statute that bars access to the courts. The effect of both is the same in attempting to confer finality on a non-judicial decision, and both would equally deny to the aggrieved party the right of presenting "at some time, to some court," the issues of law involved—a right which Mr. Justice Brandeis characterizes as demanded by the "supremacy of law."

The force of this conclusion is demonstrated by the example of the Adjustment Board in the case at bar. Here is an agency which decides without permitting the defendant to answer the complaint, without hearing evidence, without submitting allegations to the test of cross-examination, without taking proof, without allowing the parties to present arguments to the referee who decides the case, and which claims and exercises the power of modifying contract rights. The reason which respondents frankly urge for not allowing those rights to be re-examined in court, and for not permitting a suit like the present one, which would afford the only opportunity for a judicial examination of those rights, to be maintained, is precisely that the decisions of the Board would thereby be deprived of the "practical finality which they would * * * otherwise possess" (Respondents' Brief in this Court on original argument, p. 46). In other words, respondents admit that the effect of this Court's adoption of their contention, and the effect of holding that the present suit may not be maintained, would give "finality" in practice and effect to the decisions of an agency of the character described above. Clearly such a result, no matter how strenuously it may be sought to be explained away by formal arguments, is a violation of the principle which Mr. Justice Brandeis declares to be demanded by the "supremacy of law."

Even, however, if this formal and abstract distinction between "legal" and "extra-legal" coercion should be accepted for the purpose of argument, and even if it

should be admitted for that purpose that the protection of judicial procedure will be granted only against coercion imposed through legal sanctions and not against coercive "private" sanctions, it still would not follow that the carrier must be denied the right to maintain a suit like the present one. If respondents' distinction be accepted, the carrier is at least entitled to have the kind of protection which respondents are willing to allow—*i. e.*, protection against what they term "legal" coercion. And the carrier's right to that protection would permit it to maintain a suit like the present one because the coercive pressures which, in the absence of adequate opportunity for judicial relief, compel compliance with Adjustment Board awards, do in fact spring in large part from the operation of law. In other words, they cannot properly be said to be "extra-legal," because they would not exist, or would not exist with anything like the same strength and effectiveness, but for certain provisions of law.

Consider first the ability of the employes through their labor organizations to provide an effective sanction for compliance with awards. It was pointed out above (pp. 235-38) that this ability serves to differentiate the situation involved in the present case from a mere controversy between private parties, one of whom refuses to bring suit. The reason for the superior and effective ability of the labor organization to compel compliance is largely, if not wholly, because of certain provisions of the Railway Labor Act. It is the law which equips the employes through their labor organizations with a coercive power to compel compliance that they would not otherwise possess.

This coercive power arises, in the first place, from the provision of the Railway Labor Act which requires a railroad employer to deal with all employes of a given class through a single labor organization which has been certified to the employer by a government agency, the National Mediation Board, as the qualified representative or bargaining agency of the class of employes in question

(Railway Labor Act, Section 2 Ninth). Obviously, in the absence of such a provision the coercive power of the labor organization would be enormously less. Without such a provision the employer would have a freedom of action, in determining whether or not to comply with employes' demands, that it entirely lacks when required by law to deal with a single labor organization. This again differentiates the position of the railroad-employer with respect to relations with its employes from the position of a merchant or other debtor whose creditor refuses to sue and seeks to enforce a demand by extra-legal means. The merchant has a choice not to go on dealing with the creditor who seeks to apply extra-legal compulsion—he is free to turn elsewhere. The railroad-employer has no such choice and no alternative source of supply with which to deal with respect to its labor. It must deal with the union which makes the demand or submit to be deprived of its labor force. Obviously, therefore, it is not in the same bargaining position as an ordinary merchant or trader who is free to transfer his business away from a creditor who is making unjustified demands. The railroad-employer is deprived of that freedom of choice by law. Therefore the pressure which the labor organization can so effectively exert to compel compliance with Adjustment Board awards is a pressure largely created and immensely fortified by law, and so is not "extra-legal" in the sense in which respondents seek to represent it.

But this is not all. The contribution of law to the exertion and effectiveness of the pressure does not end here. Not merely does the Railway Labor Act greatly weaken the railroad-employer's bargaining power by restricting such an employer to dealing with a single labor organization. It still further restricts the employer's freedom in those dealings by prescribing what shall happen in the event the employer decides not to comply with the labor organization's demands. If the employer

does so decide, and the labor organization decides to strike, the extent to which the employer can resist is limited by law. If mediation fails, the law requires that the dispute must be submitted to a so-called Emergency Board, which does not purport to declare the legal rights of the parties but recommends a settlement of any kind that it deems fit. This recommendation is required by law to be transmitted to the President of the United States, thus obviously placing the employer in a position where its freedom of choice as a bargaining matter is reduced to the vanishing point.

It is accordingly clear that it is the provisions of the Railway Labor Act which put the railroad labor organizations in possession of the means of pressure, and of the opportunities to make that pressure effective, which they can and do employ to enforce Adjustment Board awards without taking the risk of subjecting the controversy to the determination of a judicial court. Since this is so, it is not true that the pressure and coercion are "extra-legal" in the sense which might be true of the pressure exerted by one individual on another. The pressure here concerned is a pressure, the possibility of which is created by, and which owes its existence to, law, and therefore it should no more be allowed to defeat a party's right to a judicial determination than if it were a pressure which, as in the *Young* case and the *Love* case, operated through penalties created by law. In both instances it is the law which makes the pressure possible and effective, and it cannot therefore properly be termed "extra-legal" pressure. Accordingly, respondents' argument that the effect of such pressure must be ignored in the case at bar, because it is not "legal" pressure, falls to the ground.

In the light of what has just been said, respondents' whole argument obviously takes on an even more extreme form than has previously appeared. They say in substance that, even if a form of pressure is made possible by statute which would not exist apart from the statute,

nevertheless that pressure must be held to be "extra-legal" for the purpose of defeating the right of the party against whom the pressure is exerted to have his day in court. They are thus urging a construction of the Railway Labor Act as a whole which would convert that Act into a novel mechanism for substituting pressure for law. They urge that Section 3 First (p) must be construed to close the doors of the courts to the employer so that it may be compelled by pressure to comply with a non-judicial award of the Adjustment Board, thereby giving such awards a "practical finality which they would not otherwise possess;" and then, although the means of that pressure comes into existence as a result of the law, they claim that the pressure must be regarded as "extra-legal" in such sense as to elude the operation of the principle of the *Young* case and the *Love* case. If such a construction of the statute should be accepted, a way would obviously have been found not merely to devise statutes which would remove elementary rights from the protection of fair judicial procedure, but would also enable such a result to be achieved by implication without regard to the intent of the legislature. Of this something more will be said in the next subdivision of this section.

There is one additional and very important respect in which the coercion to which the carrier would be subject, if not permitted to maintain a suit like the present one, is clearly "legal" and not "extra-legal" coercion. As set forth above in the Statement (p. 10), the award of the Adjustment Board here involved resulted in the filing by the respondents of a large number of claims for money-payments. Because of the nature of these claims, which are for wages for work that these employes have not been called upon to perform under petitioner's present operating practices, these claims are accumulating from day to day while petitioner is meanwhile paying other employes to do the work. These claims are "legal" claims enforceable at law. Clearly their continuing ac-

cumulation as a result of the existence of the award operates with strong compulsory effect, and similar claims accumulating as a result of other awards would operate with like effect in other instances to compel compliance with the awards. These legal claims, since the are enforceable at law, are entirely comparable with the penalties involved in the *Young* case and the *Love* case, and their accumulation obviously constitutes "legal" and not "extra-legal" coercion. Yet unless such a suit as this may be maintained there is no way in which petitioner and other carrier-employers in like situations can avoid the effect of such coercion. Therefore, even if, as respondents contend, legal coercion and not factual coercion is the only kind of coercion which will move the courts to hold that an opportunity must be accorded for a judicial determination of the employer's rights, it is clear that such coercion is present in ample measure as a result of awards of the Adjustment Board and that accordingly the employer must be granted an actual and not merely an illusory opportunity for a judicial determination of its rights if the principle of the *Young* case and the *Love* case is not now to be overruled.

B. Judicial Self-Restraint Should be Exercised in Reading Into Statutes, by Implication and in the Absence of an Expression of Congressional Intent, Novel and Unusual Schemes of Social Compulsion Which Violate Ordinary Standards of Fair Play and Which in the Long Run May React With Disastrous Effect Against the Very Groups and Interests That for the Moment They Appear to Favor.

Petitioner's arguments throughout this brief have practically all had to be addressed to clearing away technical contentions which have been read into the statute. From respondents' argument it might be supposed that the provisions of the Railway Labor Act interpose a series of obstacles to the maintenance of the

present suit which petitioner, if it is to prevail, is under the burden of explaining away. On the contrary, as has appeared from the discussion, respondents' contentions are not founded in the Act. They have been read into it and built up above its provisions by attempted implication for the purpose of creating objections to this suit which the Act itself does not contain. These implications all grow out of a basic and initial assumption that Congress must be presumed to have embodied a certain policy in the Act—a policy of a drastic and novel character, coercive in method and arbitrary in results, which there is no slightest evidence to show that Congress ever even considered, much less intended to embody in legislative action.

The coercive character of the policy which is assumed by respondents' arguments, and upon which those arguments all ultimately rest, has been described in a number of places in the foregoing pages. Its essence is supposed to be that, after a dispute arising out of the interpretation of a contract has been submitted by the employes, without the consent of the employer, to a non-judicial agency of adjustment which feels itself free to make an award departing from or modifying the terms of the contract, the employer must thereafter be forever barred, save at the option of the employes, from submitting the question of its contract rights to a court, in order that the employer may be "induced" to accept the award by the pressure which a labor organization, taking advantage of its legal position under the Railway Labor Act, can exert. This is stated to be for the purpose of making the award "effective," and is said to be necessary because the award finds its sanction in the economic bargaining power of the employes, and because only so will it have a "practical finality," which it would lack if access to the courts were available to the employer.

The meaning and results of such a supposed policy are obvious. It means that, whatever may be the terms and

provisions of a contract which the employer has been able to negotiate with its employes by mutual agreement through the procedure of bargaining prescribed by law, nevertheless, if at any time thereafter the employes can persuade a non-judicial body like the Adjustment Board to alter or vary those terms in any respect that they may desire, retroactively as well as prospectively, the employer can be compelled, and must submit to be compelled, by the superior power of the labor organization to accept the variation, even where this may result in the employer's having to pay "damages" for the past, because it lacks an opportunity to have its rights and obligations under the contract as agreed upon determined in accordance with fair judicial procedure. This is not merely, as has been said above, the substitution of decision by pressure for decision by adjudication. It is also the end and annihilation of contracts and bargaining, in any sense in which those words have hitherto been used, between employer and employes in the railroad industry.

What basis is there for a court to read such a policy by implication into the Railway Labor Act? Nothing in the language of the statute supports it. Nothing in the legislative history of the Act, as disclosed by the proceedings in Congress, supports it. The only possible basis for reading it into the Act would be a theory of social or political policy, to the effect that the methods and results above described represent a sound solution of certain problems in the railroad industry and might for that reason appropriately be attributed to or fathered upon the legislature as a supposedly reasonable method of dealing with those problems.

Emphasis was laid, in a period which has now receded into history, on the desirability of judicial self-restraint in erecting social and economic theories and policies which have the approval of the judges into legal requirements without warrant from the text they are construing. Respondents' contentions in this case ignore the desir-

ability of such judicial caution, and amount to a veiled invitation to this Court to use the Railway Labor Act as a springboard for erecting into law a scheme of social and economic policy which certainly ought not to be adopted by judicial action without much clearer warrant from the statute, if it could even then be adopted consistently with this Court's obligations under the Constitution.

Not only would that scheme of policy provide a way whereby the process of determining contract and other private rights by adjudication would be supplanted and superseded in favor of the enforcement of private claims by superior pressure on the part of the claimant, but, as pointed out above, it would go farther and render contracts in practical effect a nullity, since their terms would throughout the life of the contract be subject to alteration at any time by the pressure of one party without opportunity for the other to have judicial relief. Such a state of the law would reduce contracts arrived at by collective bargaining in the railroad industry to mere "scraps of paper." They would only mean what the stronger party at any moment had the power to make them mean.

When two parties make an agreement there is nothing that can intelligibly be described as a contract, if that word is to have significance, unless each party is under a legal duty to abide by the terms of the contract as entered into. Each has given consideration on his part for the right to demand such compliance on the part of the other, and is therefore entitled to look to the other for such compliance. If, during the life of the contract and while it is still in force, he can be told with finality by a wholly non-judicial agency, not professing to follow the methods of adjudication but supposedly aiming instead at making settlements which may disregard the contract, that he is no longer to be entitled to the compliance which he bargained for and which the contract

contemplates, but must accept performance of a different kind, or must give other and different consideration for continued compliance, then the original agreement cannot be said to have been a contract in any proper sense or to have been anything but an illusory interchange of words. It affords no basis for reliance and reasonable expectation in mutual dealings, and does not perform the function which contracts are supposed to perform of defining reciprocal rights and obligations for the purpose of enabling the parties to know on what footing they stand with respect to one another during the period fixed by the contract.

It is of course true that the question is now being raised in academic legal debate* whether the relations between employers and the labor organizations representing the employes should any longer be on a contract basis or whether they should not frankly be converted to a basis of status, imposed, dictated and administered by public authority. Even if it be assumed that such a result might conceivably be thought desirable, there are nevertheless two comments which are pertinent with respect to the issues raised by the case at bar. The first is that, if such relations as are here involved are to be taken out of the area of contract and made the subject of public regulation, so that considerations of supposed policy may at all times govern them, then, unless our constitutional system is to be radically altered, such public regulation will have to function through agencies which follow at least a quasi-judicial procedure, and whose determinations will be subject to adequate judicial review. The second comment is that, for the moment and under existing legislation, labor relations in the railroad industry are clearly matters of contract.

The whole theory of the Railway Labor Act, as expressly and explicitly embodied in its terms, is that wages

*The Columbia Law Review has announced that it contemplates publishing a special issue on this subject in the near future.

and working conditions are to be governed by contracts. Section 2 First of the Act provides that, "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions," and the entire Act is replete with provisions which assume that contracts, arrived at by bargaining and negotiation between the parties through their representatives, are to govern these matters.

Furthermore, the Act plainly contemplates that the terms and provisions agreed upon between the parties and embodied in the contracts are to remain in effect and be performed, observed and complied with as agreed upon, during the life of the contract or unless and until it is specifically changed in accordance with the procedure provided by the Act for making such changes. Section 6 of the Act provides that carriers and representatives of the employes shall give thirty days' written notice of intended changes in agreements affecting rates of pay, rules or working conditions, and the Act then goes on to prescribe an elaborate procedure which shall follow the giving of such notice and which functions first through conferences between the parties, next through the intervention of the Mediation Board, and finally through the submission to a so-called Presidential Emergency Board of the question whether the contract shall be changed.

These provisions leave no room for doubt that, unless and until the procedure which they outline is followed through, the original contract between the parties is intended to remain in effect, with the inevitable result that either or both must be entitled to rely upon it and to insist that it shall be observed as agreed upon. These statutory provisions are clear indication of Congressional intent that the labor union pressure which may legitimately be employed to bring about changes in contracts must be confined to, and canalized through, the procedure expressly provided by the Act for effecting such changes.

If in addition, as respondents here contend, the labor organizations may at any time compel specific changes in this or that term of the contract through the Adjustment Board, without the employer's consent, then the contract becomes a fluid mass of uncertainties, without definiteness or substance from the beginning, and the employer, as has indeed repeatedly happened, may find itself at some subsequent time coerced into paying damages for having observed the contract as originally written and understood. On such terms a so-called contract, from the very moment that it is signed, affords no basis whatever for reliance or reasonable expectation. Such a contract, so-called, is clearly not a contract in any sense. It settles nothing, fixes nothing, establishes nothing, but on the contrary becomes a mere breeding point for endless further demands, claims and controversies. The Railway Labor Act, if construed to require such a result, would not be a statute of repose but a source of discord. Plainly, no such construction should be placed upon it.

There can be no doubt that Congress in enacting the Railway Labor Act intended to promote the interests of railroad employes and their organizations. No one would of course contend that for that reason the statute should be given the construction which will permit representatives of labor to do under its guise whatever they think most favors the interests of their groups. But if on a point of interpretation questions of policy are to be considered—and they obviously cannot be excluded—it becomes pertinent to ask whether a policy of promoting the interest of labor should lead to the construction here contended for by the respondents, or whether such a policy would in fact even be consistent with that construction. On a question of construction a reasonable intent must be attributed to Congress: and would it be reasonable to suppose that Congress thought that the interest of labor would be promoted by superseding and supplanting the process of decision by adjudication in favor of decision by

pressure and superior force? Can Congress reasonably be supposed to have thought that the interests of labor would be advanced by annihilating contracts and reducing collective agreements to scraps of paper? Yet both these consequences follow if the construction contended for by the respondents here should be adopted.

The great objective for which labor has contended has been to obtain and safeguard the right of collective bargaining. That effort, which has been successfully achieved in the Railway Labor Act, presupposes the importance, the value and the stability of contracts. If contracts are now to be made nullities, the result of labor's achievement is nullified. On the other hand, if contracts are to be recognized and accorded stability for the benefit of labor, labor must recognize them as vested with like stability for the benefit of the employer, since the essence of a contract is reciprocity of obligation. If for that reason it is now desired to brush contracts aside, the alternative for labor is bound to be either regulation by the superior power of government or a perpetual trial of force with the other elements in the community, which is unthinkable for long in an industrial society, and from which surely labor as such has nothing to gain. If one or the other of these results is not to follow, there must be respect for contracts and a willingness to abide by them when once made and until changed by mutual agreement. But a respect for contracts demands that they be interpreted and applied by fair judicial procedure and not twisted to whatever results superior pressure can bring about.

In the pendulum-swing of human affairs, claims which go beyond the ordinary average human sense of fair play have hitherto in our Anglo-American democracies always resulted in reactions which have subjected the claimants subsequently to excesses from the other side, and there is as yet nothing to show that labor may not itself, like all the other groups and elements in American life, need

the protection of the elementary principle of justice which would accord to this petitioner its day in court.

Obviously, very broad issues are opened up by the questions which have been raised in the case at bar, and, as always where questions of policy cannot be avoided, they are issues of long-range justice as against immediate shortsighted advantage. Where legislative language leaves open the possibility of judicial choice, there is no room for doubt as to the direction in which the reason of our law points toward a decision. But here the case is easier. Here the language of the Railway Labor Act contains nothing that would keep the petitioner from maintaining this suit. Here the Act expresses no policy that would keep the petitioner from maintaining this suit. Here, in order to defeat the petitioner's right it is necessary that there should be raised up by supposed implication and read into the Act a policy which is not there, which is inconsistent with basic principles always applied by this Court in its decisions, which violates elementary conceptions of justice and fair-play, and which is inimical to the permanent and long-range interests of labor.

For all of these reasons, petitioner prays that the decision below be reversed and that this Court hold that petitioner may be permitted to go forward with this suit.

Respectfully submitted,

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIZER,
Counsel for Petitioner.

FEBRUARY 20, 1943.

1740 Broad St. Station Bldg.,
Philadelphia, Pa.

IN THE

Supreme Court of the United States

October Term, 1942

Case No. 28

THE WASHINGTON TERMINAL COMPANY,

Petitioner,

vs.

F. E. BOSWELL, ET AL.,

Respondents.

BRIEF OF RESPONDENTS

FRANK L. MULHOLLAND,
CLARENCE M. MULHOLLAND,
WILLARD H. McEWEN,
1041 Nicholas Bldg., Toledo, Ohio,
HAROLD C. HEISS,
Keith, Bldg., Cleveland, Ohio,
RUSSELL B. DAY,
Keith Bldg., Cleveland, Ohio,
WILLIAM E. WILLIS,
Kellogg Bldg., Washington, D. C.,

Attorneys for Respondents.

Of Counsel:

MULHOLLAND, ROBIE & McEWEN,
1041 Nicholas Bldg., Toledo, Ohio.

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Respondents.

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This action arose out of a complaint filed by the petitioner as plaintiff in the United States District Court for the District of Columbia. Certain of the petitioner's employees were named as defendants, and relief was sought by declaratory judgment. Specifically, the District Court was asked, first, "to render a declaratory decree or judgment declaring that the contract between the plaintiff and the classes of employees of which the defendants are members" did not establish in the defendants certain rights which they claimed; and second, to declare a certain award of the National Railroad Adjustment Board to be "of no legal force and effect."

It is to be noted that the suit considered from the point of view of either phase of the relief asked is one designed to reexamine a controversy theretofore decided by the National Railroad Adjustment Board, that a judgment favorable to the plaintiff would necessarily supersede the Board's decision, and that the action is essentially one seeking a judicial review of that decision.

The defendants filed an answer, the first two defenses of which challenged the sufficiency of the complaint on the ground that it failed to state a cause of action for declaratory relief. After a hearing on the legal issues thus raised, the District Court sustained the defenses and dismissed the complaint without opinion.

An appeal was taken by the plaintiff to the United States Court of Appeals for the District of Columbia, which affirmed the decision of the District Court in the case of *Washington Terminal Company vs. Boswell,* 124 Fed. 2d 235, R. 331-381, inc. The case comes to this court on a writ of *certiorari.*

STATEMENT OF ISSUES

The only question in this case is that of whether the petitioner may secure a judical review of a decision of the National Railroad Adjustment Board by declaratory judgment in substitution for the method of review provided in the Railway Labor Act for the decisions of this tribunal.

While an extended discussion of the provisions of this statute* will be given in the body of this brief, a summary statement of them is desirable here in order to clarify the scope of the issue above stated.

*The Railway Labor Act was originally enacted in 1926, and was amended in 1934. In its present form, it comprises Chapter 8, Title 45, of the United States Code. Those portions of the statute relevant to this case are reprinted as Appendix I of this brief.

One of the general purposes of the Railway Labor Act is that of providing for the orderly settlement of disputes between carriers and their employees growing out of the interpretation and application of collective agreements. As a means of carrying out this purpose, the statute provides a complete process consisting of three steps:

First—A given dispute is required to be handled through a succession of conferences between the employees or their representatives and various officials of the railroad, concluding with the highest operating official with whom the employees are authorized to confer.

Second—If adjustment is not reached through conference, it is provided that the dispute may be submitted by either party or both parties to a tribunal known as the National Railroad Adjustment Board. This Board, which is created by the statute, is a bi-partisan Board, composed of members selected by the carriers and the national organizations of employees in equal numbers. Upon reaching a decision in a given case which has been referred to it, the Board issues an award embodying its findings, and also issues an order directed to the carrier commanding it to comply.

Third—The Board itself has no authority to enforce compliance with its orders, or to institute legal proceedings for that purpose. Enforcement may be had only through suit brought by the party who petitioned the Board in the first instance, or any party for whose benefit the order was made. In such an action for enforcement, the court wherein it is filed is empowered to review the action of the Board, and either enforce or set aside its award and order.

It is to be noted that the third step mentioned above may be initiated only by employees who have secured an award and order from the Board. The carrier, according

to the terms of the statute, has no right to resort to the courts as plaintiff but it is under no legal obligation to comply with an order of the Adjustment Board until a suit has been brought against it and carried to a judgment in favor of the plaintiff.

In the present case the first two of the statutory steps have been completed, and an award and order have been issued by the Adjustment Board. The third step has never been initiated by the employees.* It is the purpose of this action to establish a substitute for this third step, the proposed substitute to take the form of an action for declaratory judgment brought by the carrier. The sole issue presented to the court, therefore, is that of whether such a substitution of remedies is permissible.

OUTLINE OF ARGUMENT

It is the position of the respondents that the method of review provided by the Railway Labor Act for orders of the Adjustment Board is exclusive, and precludes any action on the part of a carrier to seek review by declaratory judgment. This position is supported by:

I. A consideration of general principles of law governing judicial review of administrative orders.
   - A. An adequate method of review established by statute for the orders of an administrative tribunal excludes resort to other remedies.
   - B. A review which may be secured in the course of statutory enforcement proceedings is an adequate method and therefore exclusive.
   - C. The Declaratory Judgments Act has not made extra-statutory review of administrative orders available in cases where it was not available before.

II. A consideration of the Railway Labor Act and the National Railroad Adjustment Board.

*In fact, the third step is now impossible in this case because of the fact that employees may institute an enforcement action only within a period of two years after the effective date of an order of the Board. This period has elapsed since the date of the order involved in this case.

A. The functions of the Adjustment Board are such that judicial review of its orders should be confined strictly to that provided in the statute.
B. It is the intent of the Railway Labor Act that the procedure established therein for the review of Adjustment Board orders shall be exclusive.

ARGUMENT

I. A Consideration of General Principles of Law Governing Judicial Review of Administrative Orders

A. AN ADEQUATE METHOD OF REVIEW ESTABLISHED BY STATUTE FOR THE ORDERS OF AN ADMINISTRATIVE TRIBUNAL EXCLUDES RESORT TO OTHER REMEDIES.

The courts in a number of cases dealing with various administrative agencies and a wide variety of statutory provisions, have held that, where the statute provides an adequate method for the judicial review of administrative orders, that method must be followed.

The Federal Radio Act of 1927 permitted any person aggrieved by an order of the Federal Radio Commission to appeal to the Court of Appeals for the District of Columbia (44 Stat. L. 1169). The case of *White vs. Johnson*, 282 U. S. 367, involved a situation where the Commission had refused to renew the plaintiff's broadcasting license except on terms considered disadvantageous by him. He failed to perfect an appeal according to the method prescribed by the statute, but instead filed a bill in equity in another federal court seeking to enjoin the enforcement of the criminal provisions of the Act which would be applicable to him if he violated the order in question. The court held this procedure to be improper on the ground that the statutory remedy was an exclusive one. We quote the following passage from the opinion:

> "If the proceeding was an unfair one, as lacking adequate notice, full hearing, or development of all relevant facts, appellant had a remedy provided by the statute, which in the orderly processes of the administration of the law he was bound to pursue." (P. 374.)

To the same effect, see *American Bond and Mortgage Company vs. U. S.*, 52 Fed. 2d 318, and *Sykes vs. Jenny Wren Company*, 78 Fed. 2d 729.

The case of *Abe Rafelson Company vs. Tugwell*, 79 Fed. 2d 653, was an action to enjoin the Secretary of Agriculture from prosecuting the plaintiff for its failure to abide by a reparations order entered by the Secretary under the Perishable Agricultural Commodities Act. This statute provided for the enforcement of reparations orders by a procedure almost identical to that provided for awards of the National Railroad Adjustment Board, (U. S. C. Title 47, 499 g(b); 54 Stat. 214) and also provided that any person adversely affected by such an order might file a proceeding in a Federal District Court challenging the same with the proviso that: "Such suit in the District Court shall be a trial *de novo* and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be *prima facie* evidence of the facts therein stated." (U. S. C. Title 7, 499 g(c); 54 Stat. 214.)

The court held that inasmuch as the plaintiff had an adequate remedy under the statute an action for injunction would not lie.

The Securities and Exchange Act provides that any person aggrieved by an order of the Securities and Exchange Commission may apply to a Federal Circuit Court of Appeals for a review thereof. (U. S. C. Title 15, Section 78y.)

The case of *Securities and Exchange Commission vs. Andrews*, 88 Fed. 2d 441, grew out of a proceeding instituted by the Commission under Section 21e of the Act (U. S. C. Title 15, Section 78u) to enjoin alleged violations. The defendant prosecuted a cross-bill seeking to enjoin the Commission "from all activity" with respect to the securities in question. This cross-bill was dismissed by the lower court and its ruling was affirmed by the Circuit Court of Appeals, which said:

> "It is perfectly clear that a suit against the Commission, an administrative agency of the United States, can be maintained only in the courts and upon the terms specified in the statute. *Illinois Central R. R. Co. vs. Public Utilities Comm.*, 245 U. S. 493, 504, 38 S. Ct. 170, 62 L. Ed. 425, Section 25(a) of the act (15 U. S. C. A. Sec. 78y) provides how and where a person aggrieved by an order of the Commission may obtain judicial review of such order." (pp. 441-442.)

Thus, where a statute provides a method whereby the validity of administrative action may be tested in the courts, that method is held to exclude other remedies. The courts do not appear to have been influenced in their conclusions by any consideration of the presence or absence of a specific statutory direction that the method of review provided was to be exclusive.

B. A REVIEW WHICH MAY BE SECURED IN THE COURSE OF STATUTORY ENFORCEMENT PROCEEDINGS IS AN ADEQUATE METHOD AND THEREFORE EXCLUSIVE

The cases considered in the above section of the brief dealt with situations where the statute provided a means whereby a party who considered himself aggrieved by an administrative order might institute statutory review pro-

ceedings as a plaintiff therein. The same conclusion has been reached, however, where the statutory review is available only through the defense of an action brought to enforce the order in question. The following are examples:

Decisions of the Federal Trade Commission have until recently been enforceable only in the courts and after the successful conclusion of actions brought for that purpose. The fact that the defendant in such proceedings would have available to him as defenses all claims of asserted illegality in the order of the Commission has been repeatedly held to bar him from resorting to the courts as a plaintiff seeking extra-statutory review. This was decided by the Supreme Court in the case of *Federal Trade Commission vs. Claire Furnace Company*, 274 U. S. 160. The court said, in the course of its opinion:

> "There was nothing which the commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction." (Pp. 173-174.)

See also to the same effect the cases of *Royal Baking Powder Company vs. Federal Trade Commission*, 32 Fed. 2d 966, and *Federal Trade Commission vs. Maynard Coal Company*, 22 Fed. 2d 873.

The National Labor Relations Act contains provisions for the enforcement and review of orders of the National Labor Relations Board similar to the provisions of the Federal Trade Commission Act. The statutory procedure

was held to be constitutionally adequate in the case of *National Labor Relations Board vs. Jones and Laughlin Steel Company*, 301 U. S. 1, 46-47, and to be exclusive to the extent that it precludes an attack upon the Board by an action to enjoin a proposed investigation. (*Myers vs. Bethlehem Shipbuilding Company*, 303 U. S. 41, 49.)

It is, of course, true that the National Labor Relations Act further permits a party aggrieved by any order of the Board to petition a Circuit Court of Appeals for relief. He does not have to await an enforcement action and secure his judicial review by that means. The language of the two cases cited above, however, refers specifically to the *enforcement* provisions as providing for an adequate review and there is no reason to believe that the decisions would have been different had the statute contained no other review provision. This conclusion is supported by the language of the United States Circuit Court of Appeals for the Second Circuit in the case of *E. I. DuPont de Nemours and Company vs. Boland*, 85 Fed. 2d 12, a case similar on its facts to the *Myers* case, where, in the course of its opinion, the court said:

> "* * * the provisions of the act for the enforcement and review of cease and desist orders afforded the appellants an adequate, complete, and exclusive remedy." (P. 15.)

See to the same effect the case of *Carlisle Lumber Company vs. Hope*, 83 Fed. 2d 92.

The Interstate Commerce Act provides for the issuance of reparations orders under certain circumstances (U. S. C. Title 49, Section 16(1)) and in a subsequent section provides for the enforcement of such orders in language so nearly identical to that found in Section 3 First (p) of the Railway Labor Act as to lead to the conclusion that the latter named section was copied from the former and was

designed to have the same legal effect.* The exclusive nature of this provision in the Interstate Commerce Act was under consideration in the case of *Brady vs. Interstate Commerce Commission,* 43 Fed. 2d 847. The action was brought by a reparations claimant who was dissatisfied with the amount of reparation awarded him by the Commission. He brought suit under the Urgent Deficiencies Act to set aside the Commission's order. The court held that the special remedy provided by the statute was exclusive, saying:

> "In case a reparation order is not complied with and no suit is brought by the person in whose favor it is made, it amounts to nothing and could not, of course, be the cause of irreparable injury justifying an injunction order. If suit is brought, it proceeds 'in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated.' 49 U. S. C. A. Sec. 16(2). As said by the Supreme Court in *Meeker & Co. vs. Lehigh Valley R. R. Co.*, 236 U. S. 412, 430, 35 S. Ct. 328, 335, 59 L. Ed. 644, Ann. Cas. 1916B, 691, the section of the statute making these *prima facie* evidence 'cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.'

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*The section of the Interstate Commerce Act in question reads as follows:

> "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the District Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." (U. S. C. Title 49, Section 2.)

> If, therefore, the carrier deems the order erroneous, it has full opportunity to correct the error or defend against it upon the trial." (P. 852.)

The above case was affirmed without opinion by the Supreme Court in the case of *Brady vs. U. S.*, 283 U. S. 804.

Until the passage of the Declaratory Judgments Act, practically the only procedure available to a party seeking an extra-statutory review of an administrative order was by an action for injunction. All of the cases above cited were of this type. It is not astonishing, therefore, to find that certain of the courts have phrased their jurisdictional conclusions in the language of the familiar principle that equity will not intervene where there exists an adequate remedy at law. The remedy referred to in these cases is, of course, that provided by the statutory review procedure.

While this argument justifies the decisions of those cases wherein it has been employed, it is apparent that it does not express the full reason for the conclusion reached. That reason lies rather in a jurisdictional limitation imposed upon the courts either by their own decisions or by statutory provisions precluding them from substituting another method of procedure for that established by statute and especially designed to provide a means of review for the orders of the administrative agency in question. This limitation extends much farther than a mere cutting off of equitable jurisdiction, and goes to all forms of extra-statutory review whether equitable or not. The correctness of the above conclusion is revealed by the fact that of the cases above cited, five[1] are decided squarely on the ground that ground as supplemental to the fact that there exists an the statutory remedy is exclusive; one[2] mentions this

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(1) *White vs. Johnson; American Bond and Mortgage Company vs. U. S.; Securities and Exchange Commission vs. Andrews; Myers vs. Bethlehem Shipbuilding Company; E. I. DuPont de Nemours and Company vs. Boland.*

(2) *Sykes vs. Jenny Wren Company.*

adequate remedy at law; two[3] are decided without specific reference to the equitable maxim, and two others[4] apply it only after a discussion of the statutory remedy designed to show that it is one peculiarly adapted to the case at hand and which should not be interfered with by injunction. Of the two cases where the opinions are based solely on the point of the existence of an adequate remedy at law,[5] neither decides that the statutory remedy is not an exclusive one; they merely failed to consider that point.

From the foregoing, therefore, we conclude that where a statutory procedure exists wherein and whereby administrative orders may be reviewed and errors corrected, that procedure, if adequate to protect the legal rights of the parties and if affording them their day in court, is exclusive of all other remedies. Where such a procedure is available in the course of a statutory enforcement action, the same rule applies. The mere fact that the complaining party presents his claim of the invalidity of the administrative order as a defense rather than as the basis of a suit instituted by himself is not material. If the order cannot ripen into an enforceable legal obligation, save after legal proceedings wherein its legality may be fully tested, all rights of the parties are fully preserved and they may not seek review by extra-statutory means. This principle is more than a mere limitation upon the equitable powers of the courts. It is a limitation of their basic authority.

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(3) *Carlisle Lumber Company vs. Hope; Brady vs. Interstate Commerce Commission.*

(4) *Federal Trade Commission vs. Claire Furnace Company; Federal Trade Commission vs. Maynard Coal Company.*

(5) *Abe Rafelson Company vs. Tugwell; Royal Baking Powder Company vs. Federal Trade Commission.*

C. THE DECLARATORY JUDGMENTS ACT HAS NOT MADE EXTRA-STATUTORY REVIEW OF ADMINISTRATIVE ORDERS AVAILABLE IN CASES WHERE IT WAS NOT AVAILABLE BEFORE

As already noted, the cases cited in support of the propositions developed in the two preceding sections of this brief have been equity cases where injunctions have been sought. The enactment of the Declaratory Judgments Act, while making available to the courts another remedy, has not affected the limitation of their authority to entertain actions seeking judicial review of administrative orders by proceedings differing from those prescribed by statute.

The operation of the Declaratory Judgments Act is "procedural only" (*Aetna Life Insurance Company vs. Haworth*, 300 U. S. 227, 240), and "does not attempt to change the essential requisites for the exercise of judicial power" (*Ashwander vs. Tennessee Valley Authority*, 297 U. S. 288, 325). Accordingly, this Act does not extend the authority or jurisdiction of the federal courts beyond that enjoyed and exercised by them independent of it. (*American Automobile Insurance Company vs. Freundt*, 103 Fed. 2d 613, 617; *Aetna Casualty and Surety Company vs. Quarles*, 92 Fed. 2d 321; *Davis vs. American Foundry Equipment Company*, 94 Fed. 2d 441.

It is well established that certain limitations exist as to the power of the courts to grant declaratory relief in general.

Professor Borchard, co-author of the Uniform Declaratory Judgments Act, whose treatise on this subject has been widely quoted, states in this connection as follows:

> "Where, however, a *special statutory* method for the determination of the particular type of case has been provided, it is not proper to permit that issue to

be tried by declaration. This would amount to ousting of its jurisdiction a statutory court prescribed for the particular case, and it was not intended that a declaration should be employed for such a purpose."

(Borchard on Declaratory Judgments, pages 156-7.)

(Note: Emphasis the author's.)

In American Jurisprudence, Volume 16, page 295, we find the following statement:

> "A court will not take jurisdiction to render a declaratory judgment where another *statutory remedy has been especially provided for the character of case presented*, if the effect would be to interfere with the right of the parties to appeal to the court given jurisdiction in that particular matter by the statute. Likewise, a declaration will not be made where the purpose is to affect proceedings which may be taken before a public board which has full power to act in the matter and which would not be bound by the declaratory judgment. In accordance with this principle, the courts have refused to enter declaratory judgments in respect of such questions as the validity of assessments, the time for which an employee is entitled to compensation under the Workmen's Compensation Law, the inheritance of personal property, and the status of the plaintiff as the natural son of defendant, where jurisdiction as to these questions was given to other courts or boards." (Emphasis supplied.)

Declaratory judgments acts have been enacted in a number of states, and the state courts have generally limited their scope by refusing to grant declaratory relief as a substitute for a specially provided statutory remedy. A leading case in this connection is that of *Petition of Kariher*, 284 Pa. 455, 131 Atl. 265, decided in 1925. The Supreme Court of Pennsylvania made the following statement as to the law:

> "In all jurisdictions where declaratory judgment practice obtains, the rule is established * * * that a proceeding to obtain such a judgment will not be entertained * * * where another statutory remedy has been specially provided for the character of case in hand."

See also to the same general effect, *City of Erie vs. Phillips*, 323 Pa. 527, 187 Atl. 203; and *Bell Telephone Company of Pennsylvania vs. Lewis*, 313 Pa. 374, 169 Atl. 571.

Another Pennsylvania case, that of *McCalmont vs. McCalmont*, 93 Pa. Sup. Crt. 203, involved an action for declaratory judgment seeking to annul a marriage. The relief sought was refused, the court saying:

> "The state is a party in interest in divorce proceedings and in order to guard against collusion between the parties has prescribed certain forms and procedure which must be observed, including an oath or affirmation by the libellant that the facts contained in the petition or libel are true, to the best of his or her knowledge and belief, and that said complaint is not made out of levity or by collusion and for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in said petition or libel; followed by proceedings in court or before a master calculated to sift the evidence thoroughly and satisfy the court of the truth of the matters averred in the libel * * *.
>
> "These safeguards instituted on behalf of the state cannot be swept away by recourse to the Declaratory Judgments Act of 1923. *It should not be resorted to where, as here, a method has already been established for the speedy determination of the issues involved with due regard to the interests of the state as well as of the parties libellant and respondent.*" (Emphasis supplied.)

In the case of *Young vs. Bridges*, 86 N. H. 135, 165 Atl. 272, a declaratory judgment was asked as to the distribution of an estate. It was held that inasmuch as jurisdiction in such matters was specifically conferred upon the Pro-

bate Court by statute, other courts could not be asked to pass thereon through the medium of a declaratory judgment. A similar conclusion was reached in the case of *Stewart vs. Hertin*, 125 Neb. 210, 249 N. W. 552, which involved a guardianship matter.

The Court of Appeals of the State of Kentucky applied the same rule of law in the case of *Moore vs. Louisville Hydro-Electric Company*, 226 Ky. 20, 10 S. W. (2d) 466. In this case the plaintiff had instituted proceedings under the Workmen's Compensation Act of the State for certain alleged injuries. His claim was allowed by the Workmen's Compensation Board as to some particulars, but was rejected insofar as it related to a claim of hernia. The decision as to the hernia was appealed to the Circuit Court and sustained, but was later reversed by the Court of Appeals and compensation ordered. Thereafter another controversy arose as to the time during which plaintiff was entitled to be compensated for the hernia, and this action was filed seeking a declaratory judgment on that point. A demurrer to the petition was sustained in the Circuit Court, which ruling was upheld by the Court of Appeals. The latter court said:

> "It has been often written that the Workman's Compensation Law is *in the nature of an arbitration, and was intended to provide a simple and speedy method whereby employees might be compensated for injuries received.* The entire mechanics of the law shows that it was the legislative intent to vest exclusive, original jurisdiction to hear and determine matters within the purview of the Act in the Workman's Compensation Board. Provisions are made for a review of the findings of that board by the Circuit Court, and an appeal may be taken from the judgment of the Circuit Court to this Court. If the employee may ascertain that he and the employer do not agree about the length of time for which he is entitled to compensation, and then file a petition for a declaration of his rights, likewise the em-

ployer may ask for a declaration of rights, and in that way *substitute the Circuit Court and this court for the Workman's Compensation Board in determining many questions, the determination of which is vested by the law in the Workman's Compensation Board. We cannot approve thus invading the jurisdiction of that Board.*" (Emphasis supplied.)

The same principle has been applied in connection with the Federal Declaratory Judgments Act. In the case of *Aetna Casualty and Surety Company vs. Quarles*, 92 Fed. 2d 321, the United States Circuit Court of Appeals for the Fourth Circuit made the following statement as to the law:

> "The court will refuse a declaration where another court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, *where a special statutory remedy has been provided*, or where another remedy will be more effective or appropriate under the circumstances." (Emphasis supplied.) (P. 325.)

This limitation upon the jurisdiction of the federal courts to issue declaratory judgments was recognized by the Conference Committee, which assisted in the preparation of the present federal court rules. In its comment on Rule 57, which establishes certain conditions for the granting of declaratory relief, the Committee said:

> "A declaration may not be rendered if a *special statutory proceedings* has been provided for the adjudication of some special type of case, but general, ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings." (Emphasis supplied.)

If the courts are in general limited in their review of administrative orders to the procedure established by the statute creating an administrative agency, which we have found to be the case; if the Declaratory Judgments Act is merely procedural in its effect and does not alter any

general limitations which may exist as to the authority of the federal courts, and if declaratory relief may not be granted in cases where a special statutory remedy exists, it appears to follow as a matter of principle that a declaratory judgment cannot be issued as a means of reviewing an administrative order in substitution for the method of review contemplated by the statute. In the relatively few cases which have considered this question directly, we find that the courts have acted in conformity to this conclusion.

In the case of *Bradley Lumber Company vs. National Labor Relations Board*, 84 Fed. 2d 97, the court said:

> "The new power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin."

The above language was quoted with approval in the case of *Utah Fuel Company vs. National Bituminous Coal Commission*, 101 Fed. 2d 426, 431.*

Also in this connection, we call attention to the case of *Newport News Shipbuilding and Drydock Company vs. Schauffler*, 303 U. S. 54, which was a companion case to *Myers vs. Bethlehem Shipbuilding Company, supra*, and which presented very similar points except for the fact that the plaintiff asked a *declaratory judgment* in addition to equitable relief. It is highly significant that the Supreme

*It should be noted that in this case the District Court dismissed the case because of the failure of the bill to state a cause of action. Upon appeal to the Court of Appeals for the District of Columbia, that court concurred in dismissing the bill but on the ground that the District Court had no jurisdiction. Upon further appeal to the Supreme Court, the decision of the Court of Appeals was disapproved on the ground that the administrative ruling involved was not a final order appealable under the statute, but was so damaging to private rights as to justify the invocation of the equitable power of the courts. The Supreme Court affirmed, however, the decision of the District Court. Its action, accordingly, has no bearing upon nor does it minimize the significance of the decision of the Court of Appeals regarding the legal effect of the Declaratory Judgments Act in such situations.

Court decided this case in a very brief opinion, largely on the authority of the Myers case without giving any consideration whatever to the prayer for declaratory relief. It thus indicated that the scope of jurisdiction to review administrative orders is no broader under the Declaratory Judgments Act than under the general equitable powers of the court.

We conclude, therefore, both from principle and precedent, that the Federal Declaratory Judgments Act has not expanded the basic authority of the federal courts in the matter of judicial review of administrative orders, and that relief by declaratory judgment is no more available in this connection than any other form of relief where the effect of granting it will be the substitution of a non-statutory review for a procedure established by the statute under which the administrative agency is acting.

Summary

This section of the brief has been devoted to a consideration of the general legal principles applicable to this case. We have seen that where a statute provides an adequate method of review of the decisions of an administrative tribunal that method is exclusive of all extra-statutory methods. We have seen further that where an administrative order is legally enforceable only through special court proceedings brought for that purpose in the course of which the legal rights of the parties may be adjudicated, such proceedings constitute an adequate and therefore an exclusive method of review. The law does not require that a party to a controversy must be able to assert his rights as a plaintiff. It is sufficient if he is given an opportunity to vindicate them in the defense of an action brought by another. Finally in this connection, we have shown that

the courts have no greater latitude because the action seeks relief by declaratory judgment than that which they would have had were some other form of relief sought.

With these principles fully established, we next wish to direct the court's attention to the Railway Labor Act and the National Railroad Adjustment Board in order to determine whether there is any characteristic peculiar to either which might serve to make the above developed principles of law particularly applicable or inapplicable to them.

II. A Consideration of the Railway Labor Act and the National Railroad Adjustment Board

A. THE FUNCTIONS OF THE ADJUSTMENT BOARD ARE SUCH THAT JUDICIAL REVIEW OF ITS ORDERS SHOULD BE CONFINED STRICTLY TO THAT PROVIDED IN THE STATUTE.

The petitioner does not challange the accuracy of the conclusions reached in the first section of this brief as to the exclusive nature of statutory methods of review for the orders of administrative agencies in general, nor as to the limitation there expressed in connection with the granting of declaratory relief, but contends that these conclusions are not applicable to the decisions of the National Railroad Adjustment Board, and in support of its position, calls attention to certain extraordinary features in the organization and functioning of this agency.

There is no question but that the Board is a unique tribunal. Its membership is bi-partisan rather than non-partisan. Individual members are selected by the carriers and the national organizations of employees in equal numbers and are compensated by the parties selecting them.

The membership, is divided into four autonomous bi- partisan divisions. If the majority of the members of any division cannot agree upon an award in a case submitted to it, a neutral referee is selected who is compensated from the federal treasury, sits with the Division, and breaks the deadlock.

This arrangement, though unusual, is not a sufficient basis for the claim that the Adjustment Board is entirely outside the pale of the administrative agencies of government, nor for the contention that its orders are not subject to those laws of judicial review which are applicable to administrative orders generally. Rather it constitutes a recognition by Congress of the existence of an extraordinary public need and of the necessity of meeting that need by the formation of a tribunal organized on other than stereotyped lines. Such a course is consistent with the whole history of the development of administrative law, which has been characterized by a search for new methods which would be adapted to the settlement of newly realized problems. The form of organization adopted by Congress in establishing the Adjustment Board was one admirably fitted for the purpose of deciding controversies between carriers and employees growing out of the interpretation and application of collective agreements. This conclusion is amply established by a consideration of the history of earlier governmental efforts to provide for the orderly adjustment of such disputes.

It has long been the policy of Congress to foster the development of collective bargaining between carriers and their employees as a means of avoiding labor disputes which might interrupt the functioning of the nation's railroads and inflict serious damage on the public. Disregarding some of the older attempts to accomplish this result, modern efforts along this line were begun with the enact-

ment of the Transportation Act of 1920, and were continued by two later statutes—the Railway Labor Act of 1926 and the Railway Labor Act as amended in 1934. The last named statute is now in effect.

A reference to "collective bargaining" calls to mind a system whereby the employer and the selected representatives of the employees meet to negotiate a collective agreement fixing the wages and terms of employment of the employees as a group. This phase of collective bargaining is well understood. The execution of a collective agreement, however, is only the beginning—not the end of the collective bargaining process.

Such an agreement by its nature covers a large number of varied individuals and situations. If a collective agreement is made, therefore, there will inevitably arise controversies as to exactly how the agreement shall be applied in specific cases. Such controversies, while not as broad in scope as those relating to making or changing agreements, may nevertheless cause as grave disputes between the parties, and in the aggregate may as seriously threaten the disruption of the industry.

The Railway Labor Act of 1934 recognizes the existence of such disputes and the importance of providing a method for adjusting them. It provides this method in these words:

> "Section 3. First (i). The disputes between an employee or group of employees and a carrier or carriers *growing out of grievances or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the

Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis supplied.) (U. S. C. Title 45, Sec. 153 First (i).)

Both employers and employees who desire harmonious labor relations have long been aware of the advantages offered by the conference room. A conference between the employee who has a grievance, and his immediate supervisor *may* bring a ready adjustment of the matter. Too often, however, the attitudes of the direct participants are warped by prejudices and predilections of a personal or local nature. The conference is more likely to succeed if held between *representatives* of the parties, just as attorneys can often arrange settlements of legal actions when their clients cannot.

If an adjustment is not reached in conference on the property between local representatives of the persons who are involved in the dispute, the next logical step is to submit the controversy to a conference off the property, between representatives selected by the carriers generally and by employees generally—or in other words, to an adjustment board.

While local or system adjustment boards have been employed for a long time as a means of settling disputes between train service employees and the carriers, the first use of this procedure which was other than local in character, was embodied in a document known as the "Joint Settlement Awarded by the Committee of National Defense." This was the instrument which formally ended the "8-hour day" controversy during the World War. The "Settlement" which was dated March 19, 1917, contained the following provision:

"It is further agreed that if any differences arise over the application of the foregoing award, they shall be referred to a standing Commission of Eight,

four to be chosen by the National Conference Committee of Railways and four by the railroad brotherhoods. A majority decision to be binding."

The said "Commission of Eight" was duly selected as provided, and applied the settlement awarded by the Council of National Defense to approximately 225 railroads involving nearly 900 agreements and in doing so was required to make approximately 30,000 decisions. While the Commission of Eight was made up of an equal number of representatives of the employees and the railroads, it disagreed on only 3 cases; that is, there were only three matters submitted to the Commission upon which agreements were not reached.

On March 22, 1918, the Federal Director-General of Railroads issued his General Order No. 13, which approved and made effective a memorandum of understanding between the Regional Directors of the railroads and the executive officers of the Train Service Labor organizations. This order established a tribunal known as Railway Board of Adjustment No. 1, which was to adjust disputes growing out of the interpretation and application of agreements concerning rates of pay, rules and working conditions of train service employees. A copy of a portion of this memorandum is attached to this brief as Appendix II. An examination of certain portions which we have italicized in the Appendix will reveal that the Railway Labor Act borrowed freely from its phraseology.

This order was followed by General Order No. 29 (May 31, 1918) and General Order No. 53 (November 13, 1918) which provided similarly for Railway Boards of Adjustment Nos. 2 and 3, which were to have jurisdiction respectively over disputes involving shopcraft employees and disputes involving telegraphers, switchmen, clerks and maintenance-of-way employees.

During the period of Federal control, Railway Board of Adjustment No. 1 decided 3,000 cases without an appeal; Board No. 2 decided 2,000 cases with less than 10 appeals; and Board No. 3 decided 1,100 cases with only one appeal.

The following excerpt from the Report to the President by Walker D. Hines, Director-General of Railroads, for the 14-months period ending March 1, 1920, indicates the character of service rendered by the Boards of Adjustment during the period of Federal control:

> "At the beginning ofthe Railroad Administration in 1918 the Division of Labor was created as a division coordinate with the other divisions in the Railroad Administration and Mr. W. S. Carter, president of the Brotherhood of Locomotive Firemen and Enginemen, was appointed to the position of director of that division and has held it through the life of the Railroad Administration.
>
> "One of the early steps taken and an exceedingly important step, was the creation of certain bi-partisan boards of adjustment to deal with grievances of employees which could not be settled on the railroads between the local managements and the representatives of the employees. The principle of collective bargaining was frankly recognized in the creation of these boards because they were created by agreement between the representatives of the railroad labor organizations on the one hand and the regional directors of the United States Railroad Administration on the other hand. The work of these boards of adjustment has been eminently satisfactory. Each board has been composed of an equal number of expert representatives of the management and expert representatives of the employees. With a full practical knowledge of the problems the members of these boards have approached their work with the desire to do justice and with the recognition of the importance of reaching an agreement. The result is that in the several thousand cases which have come before the three boards which have been created there has been an agreement in practically every case.
>
> "Various orders of the Director-General have es-

tablished reasonable rules and working conditions, which were applicable in the very numerous cases where no rules and working conditions had been established prior to Federal control, and in some cases the rules and working conditions established by the Director-General have, by agreement, become a substitute for those which prevailed by agreement prior to Federal control.

"As a result of these defined working conditions and these boards of adjustment, the employees generally have felt that they were much better protected than formerly against arbitrary action.

"Naturally such a system requires time for it to be fully understood and successfully carried out by the vast number of local officials who are responsible for discipline and by the local labor representatives who with the local officials deal with grievances. Inevitably at first the new system had the effect in many instances of raising a question as to the authority of the local officials and caused some discouragement on the part of some of them and some misconception of the situation on the part of some employees. Nevertheless, the system has fully justified itself, and it is only a question of time and mutual understanding when local incidents of a discouraging character will disappear.

"It is an interesting commentary that on some of the largest railroads in the country, with the strongest and most effective managements, not a single case has come to one or more of these boards of adjustment. The local managements have dealt with the classes of employees represented on such board or boards so reasonably as to obviate the necessity for appealing thereto any grievances at all, and the committees representing the employees have adopted a reasonable attitude and avoided appeals to the Boards of Adjustment. Eventually this same successful treatment should be manifest on all the railroads and as to all classes of employees, if the system shall be maintained in some proper form."

These various Railway Adjustment Boards were dissolved in 1920 inasmuch as the period of Federal control of

railroads was then terminated by the Transportation Act of that year. Title III of this statute contained certain provisions designed to stabilize labor relations on the railroads. The device of Adjustment Boards was retained, although their establishment was made voluntary and not compulsory. Their jurisdiction was limited to disputes "involving only grievances, rules or working conditions," which is similar to the jurisdictional limit of the present Adjustment Board.(1)

Under this Act there were organized what were known as "Regional Train Service Boards of Adjustment"; one was established for the Southeastern Region on May 31, 1921; for the Western Region on August 25, 1921; and for the Eastern Region on November 9, 1921. The agreements setting up these boards were all substantially the same. Excerpts from that establishing the Southeastern Regional Board are reproduced as Appendix III hereof. As in the case of General Order 13 and the memorandum incorporated, the phraseology will be found to be similar to that used in the present Railway Labor Act.

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(1) For the ready reference of the court we reproduce here a portion of the Transportation Act of 1920:

"Sec. 301. It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provision of this title is authorized to hear and decide such dispute (41 Stat. L. 469).

"Sec. 302. Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof (41 Stat. L. 469).

"Sec. 303. Each such Adjustment Board shall * * * receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving only grievances, rules or working conditions, not decided as provided in Section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of Section 302, represented upon any such Adjustment Board (41 Stat. L. 469)."

The United States Railroad Labor Board which is referred to in the agreement above mentioned as an appellate tribunal to which disputes could be referred in the event that the regional board could not agree upon an award was created by the provisions of the Transportation Act of 1920. It consisted of nine members, all appointed by the President, with the advice and consent of the Senate. Three members, however, were appointed from nominees submitteed by the carriers and three from those submitted by the employees. This Board had jurisdiction of (1) disputes relating to wages (which, as we have seen above, were not within the jurisdiction of the Adjustment Boards), and (2) disputes where the Adjustment Boards had jurisdiction but had found themselves unable to agree.[1]

This Board functioned with fair success for several years until it was held that its orders lacked legal sanction (*Penna. R. R. Co. vs. U. S. Railway Labor Board*, 261 U. S. 72; *Penna. System, etc., vs. Penna. R. R. Co.*, 267 U. S. 203). After the decisions in the above cited cases the Board lost much of its influence. Consequently the whole situation under the Transportation Act become so unsatisfactory that

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(1) We copy here further relevant provisions of the Transportation Act:

"Sec. 304. There is hereby established a board to be known as the 'Railroad Labor Board' and to be composed of nine members as follows:

(1) Three members constituting the labor group representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe; (2) Three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and (3) Three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate. Any vacancy on the Labor Board shall be filled in the same manner as the original appointment. * * * (41 St. L. 470.)

"Sec. 307(a). The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. * * * (41 St. L. 470.)

the carriers and employees joined in asking Congress to repeal Title III of this statute, and to enact in its stead a new statute, the Railway Labor Act of 1926.

This latter act also considered that the best available means of adjusting disputes growing out of grievances, or out of the interpretation or application of collective agreements was afforded by the now familiar device of Adjustment Boards. It therefore continued the pre-existing policy of the government in this regard.(1)

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(1) The following excerpts are from the Railway Labor Act of 1926:

"Sec. 3. First. Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.

"The agreement—

"(a) Shall be in writing;

"(b) Shall state the group or groups of employees covered by such adjustment board;

"(c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute;

"(d) Shall provide that the parties may be heard either in person, by counsel, or by other representative, as they may respectively elect, and that adjustment boards shall hear and, if possible, decide promptly all disputes referred to them as provided in paragraph (c). Adjustment boards shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in the dispute;

"(e) Shall stipulate that decisions of adjustment boards shall be final and binding on both parties to the dispute; and it shall be the duty of both to abide by such decisions;

"(f) Shall state the number of representatives of the employees and the number of representatives of the carrier or carriers on the adjustment board, which number of representatives, respectively, shall be equal;

"(g) Shall provide for the method of selecting members and filling vacancies;

"(h) Shall provide for the portion of expenses to be assumed by the respective parties;

"(i) Shall stipulate that a majority of the adjustment board members shall be competent to make an award, unless otherwise mutually agreed;

"(j) Shall stipulate that adjustment boards shall meet regularly at such times and places as designated; and

"(k) Shall provide for the method of advising the employees and carrier or carriers of the decisions of the board.

"Second. Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish."

The United States Railroad Labor Board was abolished by the Railway Labor Act of 1926, and there was established instead a board known as the National Board of Mediation, whose functions were quite different from those of its predecessor. The new Board had no power to decide any dispute or to make any order enforceable or otherwise. Its sole authority was to attempt to bring the parties into agreement by mediation.

After the enactment of the Railway Labor Act there was established by agreement a fourth train service board of adjustment, this one having jurisdiction over the Southwestern Region. In addition some system boards were created whose authority extended only to the system involved. Many carriers, however, refused either to become parties to the agreements establishing regional boards, or to agree to establish system boards. Thus the boards of adjustment which were established and did function under the Railway Labor Act of 1926 covered only a portion of the nation's railroad system.

In addition, however, the Act provided no effective method of handling cases to a conclusion where the members of the board disagreed, and a deadlock resulted. Of course, no appeal could be taken to the United States Railroad Labor Board for that body had been abolished, and in any event its decisions had lacked binding force. The experience of the National Board of Mediation in attempting to mediate disputes where the various adjustment boards had failed to agree was so unfortunate as to cause it to become reluctant to take jurisdiction.

Even with these handicaps, however, the Regional Boards of Adjustment had disposed of the following numbers of cases prior to June 21, 1934:

Western Board	6,013
Eastern Board	1,408
Southeastern Board	1,140
Southwestern Board	808
Total	9,369

The reverse of the picture is shown by the fact that prior to the date mentioned, the Western Board had deadlocked and released jurisdiction over 374 cases which it had been unable to settle. The Eastern Board had deadlocked in 24 cases. No statistics are available as to the situation regarding the other two Regional Boards, or any system boards which may have been operating.

The existence of this whole situation prompted Congress to give further consideration to the problem, and on June 21, 1934, there was enacted the Amended Railway Labor Act. This statute further continues the established federal policy. Opportunity is still freely given to any carrier or group of carriers and its or their employees to establish or maintain system or regional adjustment boards.(1)

In case such boards are not desired, however, provision is made for the National Railroad Adjustment Board, a tribunal the scope of whose operations is nation wide. It is provided that the Board and its various divisions are to be organized on the now familiar bi-partisan plan. The only material change in organization was made by providing that

(1) Section 3. Second, of the Act provides as follows:

"Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

in the event the Board is unable to agree, a non-partisan referee shall be selected to sit with the members and with them decide the case.

The National Railroad Adjustment Board was one of the administrative bodies whose organization and operations were considered by a committee appointed by the Attorney General of the United States for the purpose of investigating administrative procedure. In a monograph issued by this committee, representing the result of extensive research by its staff ("Administrative Procedure in Government Agencies," Senate Document No. 10, 77th Congress, First Session, Part 4), we find the following summary statements of the origin and background of the Board and the nature of the controversies submitted to it:

> "Train service organizations (engineers, firemen, hostlers, conductors, trainmen, and yard-service employees) have enjoyed collective bargaining for half a century, but, with some exceptions, other railroad employees did not become well organized until wartime Federal control of the railroads. Governmental control gave a strong impetus to organizational activities, and national unions grew rapidly from 1917 until 1920. The Director General entered into national agreements with most of the unions. Three bipartisan boards of adjustment were established to interpret and apply the agreements, each resembling the system boards, all bipartisan, that had been established before the war by agreement between managements of particular systems of railroads and the train-service organizations. When in 1920 the roads were returned to private ownership, many of the unions' gains were lost. Company unions were established, and some system boards of adjustment again created, all of which were of the bi-partisan type. By agreement between railroads and train service organizations, four regional boards were set up, all of which were also bi-partisan. In addition, Congress in 1920 created the Railroad Labor Board, a tripartisan organization representing carriers, labor, and the public. During its 6-year existence,

this Board disposed of 13,690 disputes, but largely at the insistence of organized labor it was finally abolished. The regional boards continued to dispose of many disputes, but gradually accumulated large numbers of deadlocked cases. Finally, in 1934, the National Railroad Adjustment Board was created to supersede the regional boards, and to take over their accumulations of deadlocked cases. The Adjustment Board also supplanted a large number of system adjustment boards. Thus, down to 1934, all agencies including system boards, regional boards, and national boards, had been bi-partisan, with the single exception of the Railroad Labor Board, which had not succeeded. And the personnel of each bi-partisan board consisted of regular employees of each side. It was therefore not surprising that the same pattern was followed when the National Railroad Adjustment Board was organized." (Pp. 1 and 2.)

* * * * *

"The Board's single purpose is to receive disputes between employees and carriers growing out of grievances or out of the interpretation and application of labor agreements. The agreements are comprehensive documents brought into being through processes of collective bargaining. As of June 30, 1939, there were 4,069 agreements on record, of which 3,556 were with national labor organizations. Most of the agreements contain more than a hundred 'rules' dealing with such matters as hours, piece work, shifts, overtime, holidays, lunch periods, emergency service, filling of vacancies, promotions, reduction of forces, seniority, grievances, apprentices. In addition, there are 'special rules' applicable to particular crafts. For example, a 'boiler maker' is defined, his work is elaborately classified, detailed provisions are made for his protection and safety while at work, and many other details about his duties and rights and liabilities are prescribed. All these rules with their various interpretations become exceedingly intricate, and numerous disputes arise concerning their interpretation and application." (P. 3.)

The National Railroad Adjustment Board was formally organized in August, 1934, and hearings of cases were started in December of that year. The last available statistics showing the number of cases handled extend to June 30, 1941. Prior to that date, the First Division of the Board had decided 6,138 cases, the Second Division, 658 cases, the Third Division, 1,755 cases, and the Fourth Division, 103 cases. (These figures are abstracted from the first seven Annual Reports of the National Mediation Board, which include reports of the National Railroad Adjustment Board as appendices.)

The whole history of the Adjustment Board idea, coupled with the highly significant history of the National Railroad Adjustment Board has revealed:

(1) That there exists a class of controversies between employers and employees growing out of grievances, or out of the interpretation or application of collective agreements, which in the aggregate is of such consequence as to constitute a threat to interstate commerce unless a means of orderly disposition is provided, and,

(2) That the Adjustment Boards have performed the function of settling such disputes with a high degree of success.

The petitioner insists that all of these controversies are justiciable in nature and could have been handled by the courts, and this conclusion is supported by the decision of this court in the case of *Moore vs. Illinois Central Railroad Company*, 312 U. S. 630.

The fact remains, however, that during the period when adjustment boards were handling such cases by the thousands, the diligence of petitioner's counsel has revealed and cited to the court only a score of reported cases, where the

jurisidiction of the courts has been invoked to pass upon them. It is significant also that all of the cases cited were instituted by employees and none by the carriers. Making due allowance for the number of cases which may have never attained the dignity of reported decisions, and then making comparison with the records of the adjustment boards, it is apparent that there has been a marked reluctance to submit controversies of this nature to the courts, but an entire willingness to submit them to administrative adjustment boards. Whether this attitude may have grown out of a consideration of the expense incident to legal proceedings, or out of a preference for the more elastic procedure of the adjustment boards, or from some other cause, it is useless to speculate. The fact of the existence of this preference is, however, clearly shown. It was a fact confronting the Congress when the Railway Labor Act was before it for consideration. The alternative before it, therefore, was not whether to entrust these controversies to the courts or to an adjustment board, but rather the alternative of entrusting them to an orderly administrative process which the parties could and would utilize, or leaving their settlement to the hazardous exigencies of industrial warfare.

That Congress in the furtherance of its declared purpose to stabilize labor relations on the railroads should adopt the method of order rather than disorder was inevitable. The wisdom of that choice cannot be denied. The form of the administrative board created was one sanctioned by a long and successful history and was the only form of orderly process of which the parties had shown any substantial disposition to avail themselves. That the form selected was unique is thus fully explained by the unique nature of the need it was created to fulfill.

From the foregoing discussion, therefore, we conclude that the National Railroad Adjustment Board, while somewhat unusual, both as to its form and its functions is in no sense an anomaly among administrative agencies. Its bipartisan organization is the natural outgrowth of years of experience which established this form of tribunal as being the most successful in the handling of those disputes between carriers and their employees which arise out of the interpretation of collective labor agreements. The Board operates in a technical field. Its duty is the highly important one of deciding the disputes submitted to it in such manner that no interruption to the operation of the transportation industry shall result. Its history shows conclusively that it is performing this duty. In short, the Board is an administrative agency organized in such manner as to be able to perform successfully a complicated function. In this respect, it differs in no way from other agencies of the Government. Its decisions are entitled to the same relative weight, and provisions made by the Railway Labor Act for their review are entitled to the same exclusive operation as is the case with relation to other statutes. It is submitted, therefore, that the general rules of law governing these subjects are fully applicable to the awards and orders of the National Railroad Adjustment Board.

The petitioner, however, insists that the above conclusion does not follow for the reason that decisions of the Board are not "quasi-judicial" in character. It argues that, since the decisions of such bodies as the Interstate Commerce Commission and the Federal Trade Commission *are* quasi-judicial, and since the National Railroad Adjustment Board is an entirely different type of tribunal, therefore its decisions cannot be "quasi-judicial."

This argument, however, completely miscontrues the

significance of the term "quasi-judicial," which is a word of reference rather than one of definition. It is used to characterize a vast number of governmental agencies, their powers and acts, on occasions when they are called upon to decide individual rights in a manner which is analogous to, but not identical with that employed by the courts. This analogy to judicial action may be close or remote, depending upon the character of the controversy, the degree of finality of the administrative order, and other factors. Thus, the term "quasi-judicial" may take on many shades of meaning, depending upon the agency to which it refers in a particular case. That the National Railroad Adjustment Board and its orders may not have the same degree of similarity to courts and their decrees as is the case in relation to some other agency of government, does not establish that the Board is not a quasi-judicial body.

Further in support of its position, the petitioner in its brief refers at length to certain statements which were made by the respondents before the lower courts in an effort to explain the functioning of the Board. We called attention to the fact that the decisions of the Board were to a degree prospective as well as retrospective in effect. We noted that the basic purpose of the Railway Labor Act is to bring about a peaceful relationship between carriers and employees. We suggested that this factor should influence and probably has influenced the Board in its decisions, and that a just compromise may, upon occasion, be more in keeping with the purpose of the Act than a decision which will establish the position of either party in *toto*. This statement has been seized upon by the petitioner as an assertion that it is the function of the Board to make new contracts for the parties rather than to interpret existing ones. We advance no such contention.

The Railway Labor Act contains two distinct sets of provisions, the one for the making of agreements between carriers and employees, and the other for their interpretation. The first provides for a process of (1) negotiation, (2) mediation under the supervision of the National Mediation Board, (3) arbitration if the parties agree thereto, and (4) in cases threatening a stoppage of essential transportation, proceedings before special Emergency Boards appointed to investigate and report. The second group of provisions deals with the interpretation and application of existing agreements and contemplates (1) conferences between the parties, (2) a hearing before and decision by the National Railroad Adjustment Board, and (3) judicial enforcement of the awards of the Board if they are not voluntarily applied. No tribunal established or provided for under the Act has any power to make an agreement for the parties, save only arbitration boards, which act, if at all, with the mutual consent of all concerned. Certainly the National Railroad Adjustment Board has no such power, and indeed, has no power to act in any way in connection with the making or modifying of agreements. We have not imputed any such authority to it, and any attempt to do so necessarily runs counter to the express terms of the statute.

It is submitted that all administrative agencies must look forward as well as back in the formulating of their decisions. To them is entrusted the task of implementing congressional policy. The fact that the National Railroad Adjustment Board may take this course at times is no indication that its decisions are not "quasi-judicial" in character.

Finally in this connection, the petitioner insists that the orders of the Board are not quasi-judicial because of the character of the hearings which the Board conducts.

We do not propose to embark upon any discussion of the merits or demerits of the Board's rules of procedure.* It is sufficient for our present purpose to note that the Board has full authority, under Section 3 First (u) of the Railway Labor Act, to adopt rules of procedure, that it has adopted such rules, and that its proceedings are covered thereby. If it be a fact that any such rule has the effect of violating any general principle of law or depriving any person of basic legal rights, the result is merely that the rule and proceedings conducted thereunder are subject to nullification by the courts in an action brought to enforce the resulting order. The character of the Board as being quasi-judicial or otherwise is not determined by the rules which it may adopt. To so hold would permit any tribunal to determine its own standing in this respect, regardless of the provisions of the statute which created it, or of the governmental policy underlying such a statute.

Summary. As noted in the above discussion, the petitioner has pointed out that the National Railroad Adjustment Board departs to some extent from the familiar pattern of administrative agencies. Attention is called to its bi-partisan organization, to the fact that its decisions are forward looking and not purely retrospective, and to its methods of procedure. The existence of these features is fully conceded.

The respondents, in an earlier section of this brief, have pointed out the existence of a rule of law to the effect

*Such a discussion was conducted before the Attorney General's Committee on Administrative Procedure, referred to above. Its conclusions in relation to the National Railroad Adjustment Board are set forth in its report, Senate Document No. 8, 77th Congress, First Session, pp. 185-188, inc.

Further in relation to the nature and procedure of the Board, we refer the court to an article entitled "The National Railroad Adjustment Board, A Unique Administrative Agency," by Mr. Lloyd K. Garrison, Dean of the Law School of the University of Wisconsin, printed in 46 Yale Law Journal 567, and a study entitled "The National Railroad Adjustment Board," by Mr. William H. Spencer, Dean of the School of Business of the University of Chicago and published by the University of Chicago Press.

that a special statutory method for the review of administrative orders is exclusive of all others. Petitioner asserts that the unique features to which it calls attention in connection with the organization and operation of the Adjustment Board, are effective to nullify this rule of law in this case and to render non-exclusive the method of review established by the Railway Labor Act.

Factual differences among cases will not cause the application of different rules of law unless they reach to the reasons for those rules. The reason for the rule that a statutory method of review of administrative orders is exclusive, is to be found in the natural reluctance of the courts to in any way interfere with the operation of declared congressional policy save as such interference may be required to protect constitutional rights. Where Congress has provided for administrative procedure designed to result in decisions, and a method of judicial review is established for such decisions, it must be presumed that the two are designed to complement each other in the furtherance of the basic purpose sought to be attained. A judicial overthrow of one of these two complementary elements may well result in the complete disruption of the congressional purpose. Only if it can be shown that no such result can follow in a given case can extra-statutory judicial intervention be justified.

The petitioner has sought to make such a showing by pointing out certain distinguishing features in connection with the organization and procedure of the Board. These features, however, do not establish that the judicial channels provided for a review of the Board's orders can be by-passed and disregarded without endangering congressional policy. To the contrary, they lead to an exactly opposite conclusion.

The extraordinary character and functions of the

Board indicate the existence of a definite purpose on the part of Congress to make provision for the solution of perplexing and delicate problems. Prior experience had indicated that these problems could not be solved by the mere establishment of an administrative board, regardless of kind. The earlier adjustment boards had succeeded in settling the sort of disputes under consideration where other agencies had failed. Hence, it was but reasonable to select this type of tribunal for the furtherance of the congressional plan. Its unique character is ample evidence of the unique need which it was designed to fill.

Congress was not content, however, with the mere establishment of the Board. It provided a special method whereby its decisions might be enforced and reviewed. The petitioner insists that the character of the Board itself may be projected upon the review procedure established in order to determine whether such procedure is exclusive or otherwise. We agree with this contention but have shown that such a projection reveals a congressional plan of combined administrative action and judicial review carefully conceived, precisely integrated and proven successful in operation. The introduction of an extraneous method of review is likely to disturb the equilibrium of this whole specialized structure and bring about its collapse.

We submit, therefore, that the unique character of the Board is effective to establish the exclusive nature of the statutory provisions for review rather than the contrary.

B. IT IS THE INTENT OF THE RAILWAY LABOR ACT THAT THE PROCEDURE ESTABLISHED THEREIN FOR THE REVIEW OF ADJUSTMENT BOARD ORDERS SHALL BE EXCLUSIVE

Having considered the inferences which may be drawn from the character of the Adjustment Board in relation to

the exclusive nature of the statutory review proceedings, we next desire to call the court's attention to the portions of the statute which provide for such review in order to further explore the congressional intent underlying it. The Railway Labor Act does not in terms declare that this review procedure shall be exclusive, but such an intent is clearly implied by the language used.

In the first place, it should be noted that Section 3 First (m) of the Act provides that:

> "The awards shall be *final and binding upon both parties* to the dispute, except insofar as they shall contain a money award." (Emphasis supplied.) (U. S. C. Title 45, Section 153 First (m).)

It is clear that the words italicized in the above quotation do not give to the awards of the Board any absolute finality because provision is made in a subsequent section for the review of such awards by the courts. On the other hand, it may not be concluded that the phrase in question is mere surplusage and therefore meaningless. A reasonable construction of this language which avoids both of these extremes, is to the effect that Congress intended the awards to be final unless set aside in the course of proceedings specifically authorized for the purpose of their review. Such a construction imputes a definite and logical significance to this provision. So interpreted, the statutory language contains a clear implication that the review procedure established is to be exclusive.

There is yet another conclusion, however, to be drawn from the language of Section 3 First (m) above quoted. This court has held that the existence of the Adjustment Board and the availability of an administrative remedy through the operation of its procedure does not prevent original resort by a claimant to the ordinary processes of the courts. (*Moore vs. Illinois Central Railroad Company*, 312 U. S. 630.) In the case of *Adams vs. New York, Chi-*

cago & St. Louis Railroad Company, 121 Fed. 2d 808, 810, the court held on the authority of the *Moore* case that "the employees' action may be brought, at their election, either in a court, or settled by the administrative remedies prescribed by said Act." It has further been held in the case of *Austin vs. Southern Pacific Company*, 123 Pac. 2d 39 (decided March 3, 1942, by the District Court of Appeals for California, First District, Division 1), that where an employee has elected to pursue his administrative remedy before the Adjustment Board and has received an adverse decision, he is precluded entirely from all resort to the courts. The court quotes in support of its decision the statutory provision that the awards of the Board shall be "final and binding upon both parties to the dispute."

This ruling appears to be in accord with the decisions of the federal courts construing the reparations provision of the Interstate Commerce Act (provisions for the review of reparations orders being, as already noted, almost identical with those established for the review of orders of the Adjustment Board) where it has been held that one who voluntarily seeks the administrative remedy provided in the Act is limited in his further relief to the statutory procedure for enforcement and may not claim more before the courts than he received at the hands of the Commission. See *Baltimore and Ohio Railroad vs. Brady*, 288 U. S. 448; *Western New York & Penn. Railroad Company vs. Penn. Refining Company*, 137 Fed. 343, 355; *Terminal Warehouse Company vs. Penn. Railroad Company*, 297 U. S. 500, and *Minds vs. Pennsylvania Railroad Company*, 237 Fed. 267. To our knowledge no case has ever arisen where a claimant who has been denied a reparation order by the Interstate Commerce Commission has thereafter resorted to the courts. This fact in itself is not without significance considering the age of the statutory provision involved. Cer-

tainly the implication from the above cited cases is to the effect that no such action can be brought.

If the employee claimant who has elected to pursue his administrative remedy before the Adjustment Board is concluded by an adverse decision and if, as the petitioner here contends, a decision adverse to the carrier is so completely ineffective that the latter may immediately file an action *de novo* for a declaratory judgment seeking a re-examination and redetermination of the very issues considered by the Board and is not even under legal compulsion to await the bringing of a statutory enforcement action and the securing of a review therein, it follows that the employee who submits his case to the Board has everything to lose and nothing substantial to gain thereby. The carrier on the other hand, may win an absolute and final victory before the Board or, if defeated, its loss is legally inconsiderable.

The inevitable consequence of such a situation would be that employees would become increasingly reluctant to submit their cases to the Board and the purpose of the Act to provide for the speedy and peaceful adjustment of such cases would be correspondingly defeated.

In considering the question of the exclusive nature of the review procedure of the Act, we are not limited to a consideration of the provisions of Section 3 First (m).

Section 3 First (p), which establishes the procedure for review, provides for certain advantages to a plaintiff seeking to enforce an award of the Board, advantages which are not available to plaintiffs generally. While this paragraph of the statute is reproduced in Appendix I, we wish to set it out in full here, italicizing those portions which seem to us to be of particular significance. The paragraph reads as follows:

> "If a carrier does not comply with an order of a division of the Adjustment Board within the time

limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States *for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates,* a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit *the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated,* and except that *the petitioner shall not be liable for costs* in the District Court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he *shall be allowed a reasonable attorney's fee,* to be taxed and collected as a part of the costs of the suit. The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (Emphasis supplied.) (U. S. C. Title 45, Section 153 First (p).)

It is apparent that the statute contemplates four distinct advantages to persons appearing as parties plaintiff in this type of action. These advantages are:

(1) A choice of venue which is much wider than that available to plaintiffs in other actions.

(2) A lightened burden of proof growing out of the provision that the findings of fact of the Board are to be considered *prima facie* correct.

(3) Non-liability for costs save upon appeal by the plaintiff.

(4) An opportunity to recover reasonable attorney fees from the defendant carrier.

The petitioner has asserted that these provisions amount to little more than the normal perquisites of any plaintiff in any litigation. It is apparent, however, without argument, that a much more considerable advantage was sought to be created. There would be no purpose in including such provisions in a statute if the only intent was to give to the parties the same rights which they would normally enjoy as plaintiffs in any event.

Taken as a whole, these provisions are designed to accomplish three results. In the first place, they are intended to make court proceedings based on awards of the Board unattractive to carriers. Similar provisions in the Interstate Commerce Act for the review of reparations orders of the Interstate Commerce Commission have been construed as having this effect. See *Meeker vs. Lehigh Valley Railroad Company*, 236 U. S. 412, and *St. Louis and San Francisco Railroad Company vs. Spiller*, 275 U. S. 156. It is apparent, therefore, that the purpose of the framers of the statute was to discourage, insofar as possible, noncompliance with the awards of the Board, and to give to them a degree of practical finality which they would not otherwise possess.

Secondly, the procedural obligation ordinarily falling upon a plaintiff to make a *prima facie* case is lightened by providing that the findings of the Board shall be considered as *prima facie* correct. The burden of proof is thereby shifted in part to the defendant carrier.

Thirdly, the financial burdens of litigation are in part removed from those seeking enforcement. The plaintiff in such an action is permitted a choice of venue most convenient to himself, and is therefore not subjected to the financial burden of filing suit in a district where the principal operating office of the carrier is located, an obligation which is often onerous. The plaintiff faces no risk of

financial loss through the imposition of court costs except upon his own appeal. Finally, he is insured an opportunity to procure capable counsel without expense to himself.

The total result of all of these provisions is to impress upon the orders of the Adjustment Board a substantial degree of finality. That effect will be nullified if the carrier is free to secure a review through some form of action other than that provided in the statute where these same advantages will not be and cannot be made available. There can be no question but that the advantages referred to were established by Congress in furtherance of the basic purpose underlying the statute, which was to provide a tribunal which might adjust and decide the type of cases submitted to its jurisdiction with as little interference as legally possible from the courts. To the extent that extra-statutory review is permitted, therefore, congressional purpose will be nullified. Neither an action for a declaratory judgment nor any other form of action for review can be justified if such is to be the result. We know of no better expression of this thought than that contained in the opinion of the Court of Appeals. The statement of the court is too lengthy to be reproduced here in full but may be found on pages 334-336 of the Record, to which we refer the Court.

The petitioner attempts to avoid the conclusion above stated by asserting that even after a declaratory judgment action is filed to review an order of the Adjustment Board, the employees may still file suit for enforcement under the statute and thus secure for themselves the benefits intended by the Act. It cites cases to the effect that where jurisdiction of an action *in personam* is secured by one court, another court is not barred from acquiring jurisdiction in another case involving the same issues. The petitioner further expresses the belief that the court before whom a declaratory judgment action was pending might, in

the exercise of a sound discretion, stay its proceedings until the statutory action could be decided.

This line of argument has two serious flaws. In the first place, none of the cases cited by the petitioner involves a situation where the two pending suits were respectively a non-statutory and a statutory review proceeding. If the rule for which petitioner contends is to be applied in such cases, it will result in the nullification of the whole body of law to the effect that statutory methods of review for administrative orders are to be pursued to the exclusion of others. If such a rule is applicable in the case at bar, it is equally applicable to cases involving the review of decisions of the National Labor Relations Board, Federal Trade Commisison and other administrative agencies considered in the first section of this brief. It would permit the bringing of a non-statutory action to review a decision of any of such bodies, subject, however, to its being stayed at the sound discretion of the court, upon the filing of a statutory action for review. The courts, however, have not accepted this view of the situation but have dismissed non-statutory actions for lack of jurisdiction. We conclude, therefore, that however authoritative the petitioner's cases may be to the effect that a court is not debarred from accepting jurisdiction in a case because of the fact that another court has theretofore acquired jurisdiction to try the same issues, they are ineffective to establish the proposition that such other court *has properly acquired jurisdiction in the first instance* in the face of an objection that the action first filed involved a non-statutory method of review.

In the second place, the validity of the petitioner's argument is entirely dependent upon the assumption that the court before which the non-statutory action is pending will in fact stay that action until the statutory proceeding

is brought to a conclusion. We use the word "assumption" advisedly. We are aware of the fact that a sound judicial discretion is not synonymous with caprice, and that court orders made in the exercise of such discretion are subject to review and reversal. Nevertheless, any realistic approach to the question must recognize that judicial discretion, especially in such a little charted field as that of administrative law is necessarily elastic and unpredictable. If the federal courts may entertain actions for declaratory relief as a means of review of orders of the Adjustment Board, no reason is apparent why the state courts may not do so as well in proper cases, and in those jurisdictions where such actions are permitted. No one can deny that concepts of the proper exercise of judicial discretion differ widely from jurisdiction to jurisdiction. Hence, the petitioner's contention that the employees may depend on judicial discretion for the protection of the rights granted them by the Railway Labor Act subjects the enjoyment of those rights to speculative considerations whose seriousness may depend upon the jurisdiction where the suit is brought, a situation which was certainly not contemplated by Congress. We submit that the adoption of the petitioner's contention would produce unending litigation in state and federal courts and might well result in legal chaos as far as this type of action is concerned.

From all of the foregoing, we conclude that the Railway Labor Act provided for employees or their representatives seeking enforcement of an award of the Adjustment Board certain rights by way of extraordinary advantages in the prosecution of an action for that purpose; that these advantages constitute an aliquot part of the whole statutory scheme; that if the courts entertain actions for declaratory judgment as a means for extra-statutory review, the advantages provided in the statute for employees will either

be lost or their enjoyment rendered precarious, and that the statutory scheme will be thereby disrupted and nullified. No means of avoiding this undesirable result is apparent save by concluding that the method of review provided by the statute is exclusive and such, we submit, was the clear intent of Congress.

The decision of this court in the case of *Moore vs. Illinois Central Railroad Company*, 312 U. S. 630, in no way militates against this conclusion. In the *Moore* case, an employee brought an action for wrongful discharge. The defendant carrier contended that the action was prematurely brought "because of his (plaintiff's) failure to exhaust the administrative remedies granted him by the Railway Labor Act." The court, however, found "nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court." In the course of its opinion the court stated that:

> "Neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based upon a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

There is nothing either in the decision of this case or the reasoning underlying it which is in any way contrary to respondents' position here. The fact that the Railway Labor Act evidences no intent that the mere existence of the administrative procedure therein provided shall exclude direct resort to the courts does not establish that, where administrative relief under the Act has been sought and secured, the courts are free to ignore the statu-

tory channel provided for its review or to ignore the administrative order itself and proceed *de novo* to hear the controversy on its merits. Thus, the actual decision in the *Moore* case constitutes no precedent for the case at bar because of the wide difference existing in the circumstances of the two actions.

The petitioner, however, calls attention to the court's statement quoted above as to the "voluntary" nature of the statutory scheme for "peaceful adjustment and mediation" of disputes. It construes this language as holding that where this voluntary procedure has been adopted and an order issued, the order itself is voluntary in nature and without any legal effect even to the extent of limiting the avenue of review to that established by the statute.

We do not understand the court's language as implying that there is no element of legal compulsion inherent in any phase of the Railway Labor Act or the proceedings therein authorized. Indeed, in the case of *Virginian Railway Company vs. System Federation No. 40*, 300 U. S. 515 the Court expressly recognized that such compulsion was exerted as to a number of elements in the statutory scheme.

The statement here in question must be construed in relation to the facts and issues before the court. So construed, it is clear that the court referred to the *resort* to the administrative procedure in the Act as being voluntary in that the complaining party was not bound to submit his rights to administrative determination but might choose between the administrative and the judicial procedure available. The court did not intend to, nor did it characterize the awards of the Board as being merely precatory in effect. It did not hold that a court may ignore them and entertain an action whose effect would be to hear the whole controversy *de novo* to the preclusion of the prescribed statutory review.

The court below rested its decision on the proposition that the review procedure in the Railway Labor Act is exclusive. This conclusion we believe to be correct. However, the court would not have needed to go so far in order to justify a dismissal of this action. It is to be remembered that this is a suit for declaratory judgment. While jurisdiction to entertain an action for declaratory relief may not be defeated on account of the existence of another adequate remedy, nevertheless as above noted, such relief may not be granted as a substitute for a *special statutory remedy*. Whatever may be said of the review procedure provided for in Section 3 First (p) of the Railway Labor Act as to its exclusiveness or otherwise, it can scarcely be denied that it contemplates a special statutory remedy. The fact of the existence and availability of such a remedy precludes the granting of a declaratory judgment in substitution for it.

Finally in this connection, we recognize that all of the above discussion and the conclusions reached therein are subject to one important limitation. Any statutory method of review must be adequate to protect the legal and constitutional rights of the parties or it cannot be considered as excluding a resort to other remedies.

The petitioner asserts that the statutory review is not adequate to protect its legal rights. The simple and final answer to this contention is found in the fact that an order of the National Railroad Adjustment Board has no legal force in and of itself, and can acquire no such force until it has been made the basis of a successful enforcement action. In the course of such an action, the courts are fully empowered to inquire into the legal propriety of the award and make such orders as may be necessary to protect the rights of the parties. No carrier, therefore, can come under any legal compulsion as a result of an

Adjustment Board award until after it has had its day in court.

Although we believe that this fact disposes conclusively of all of petitioner's claims of deprivation of rights without judicial hearing, nevertheless it should be noted that the petitioner asserts that it is under certain elements of extra-legal pressure which virtually compel it to comply with the award of the Board without such a hearing. It contends that this consideration should induce the court to rule in its favor in this case. We wish accordingly, to note briefly certain of the claims made in this connection.

In the first place, the petitioner contends that the employees have refused to exercise their right to bring an enforcement action and instead have relied on their collective economic bargaining power to bring about compliance with the award. It represents itself as being faced with a threat of strike sufficient to induce it to sacrifice its legal rights as the price of labor peace. It is noteworthy, however, that the award and order of the Adjustment Board were issued nearly four years ago. This alleged threat of strike has been effective during this entire period, but it has not produced a sufficient degree of economic pressure to cause the petitioner to recede one jot from its original position. The fact is that petitioner has had no strike on its property and insofar as we are aware, has faced no serious threat of strike. Certainly such a threat, if existent, has been ineffective to produce any compulsion as far as the petitioner is concerned. This claim, therefore, has little weight.

The petitioner furthermore asserts, however, that it has been necessary for it to build up a reserve approximating $80,000 per year to cover its contingent liability to the respondents growing out of the award of the Board. It will

be recalled that this award is one which construed an existing contract. The contract in question contains the following provision:

> "Should either the management or the enginemen and firemen desire to change any or all these regulations, the party desiring to make the change shall notify the other party in writing of the desired change; and no change will be made, except by mutual consent, until thirty days after such notice has been given." (Article 22, page 39 of the Record.)

The Railway Labor Act likewise permits a change in any contract between a carrier and employees on thirty days' notice, subject to some extensions in the period in the event that the dispute comes before the National Mediation Board or in the event that an Emergency Board is appointed to investigate and report. It can be safely stated, however, that the petitioner could have entirely abrogated those portions of the agreement upon which the award is based in three or four months' time at the most. It could, therefore, have entirely eliminated the source of the contingent liability which it claims at any time either before or after the issuance of the award in question.

It is no answer to this argument to say that the petitioner deemed it inexpedient to seek to change its rules on account of the possibility of a serious labor dispute resulting. Where a litigant has an opportunity to eliminate a threat of loss but hesitates to do so on account of considerations of business expediency, he cannot expect the courts to come to his relief. It is not the function of the judiciary to seek to equalize the economic positions of parties who appear before it.

In the foregoing discussion we have considered the factors which the petitioner asserts are effective to obstruct the means of access to the courts provided by the Railway

Labor Act for this type of case, and have found them to be illusory or self-created. A litigant may not nurture conditions asserted to be perilous to itself and then ask the courts to relieve it of the peril. Even, however, if the petitioner were able to establish that the situations of which it complains were truly burdensome and truly beyond its control, it would not thereby have advanced its case. The courts are not concerned with extra-legal reasons why a party may not desire to submit his rights to a special method of adjudication. If the road to the courts is open as a matter of law, the judiciary cannot be expected to clear it of all practical obstacles which may render travel difficult. The removal of such obstacles is a matter of legislative and not judicial consideration.

We conclude, therefore, that no legal compulsion can become effective against the petitioner as a result of an award of the Adjustment Board until after a full judicial hearing as provided by the Railway Labor Act; that the petitioner will have the opportunity to assert any and all defenses which it may have in such a hearing, and that accordingly, it is not deprived of any legal or constitutional right by being required to await the bringing of a statutory action instead of proceeding itself to seek review by declaratory judgment.

In summary, as to this section of the brief, therefore, we submit that the Railway Labor Act by necessary implication requires that the review procedure established by it for the orders of the Adjustment Board shall be exclusive. The provision that awards of the Board shall be "final and binding" clearly indicates such an intent as do those portions of Section 3 First (p) which establish special advantages for employees in enforcement actions, advantages which form an integral part of the whole statutory scheme and which would be annulled were another method

of review to be permitted. We have shown further that there is no legal inadequacy inherent in the statutory proceeding because no legal obligation can be created until after full judicial hearing. This action, therefore, is intended as a substitute for a remedy made exclusive by statute and one which constitutes a "special statutory remedy" especially provided for the review of decisions of the Board. Under such circumstances, an action for declaratory judgment will not lie.

CONCLUSION

We have presented the issues of this case from two basic points of view:

In the first place, we have directed the court's attention to the legal principles which have been developed and which govern this type of action. We have shown that:

(A) Where a statute provides a means for the review of administrative orders, that means, if adequate to protect legal rights, is exclusive of all others.

(B) Where an administrative order can be rendered legally effective only through enforcement proceedings provided for by statute, and where, in the course thereof, the parties have a full opportunity to assert their legal rights, the statutory proceedings afford an adequate and accordingly an exclusive method of review.

(C) The courts are limited in the granting of declaratory judgments to causes of action where no special statutory remedies exist for the type of controversy sought to be adjudicated.

In the second place, having developed these legal principles, we have applied them to the National Railroad Adjustment Board, its awards and orders, and to the provi-

sions of the Railway Labor Act for the enforcement of such awards and orders. We have seen that:

(A) The Adjustment Board was established to fulfill a special purpose which no other type of agency seemed able to perform. Its form of organization, therefore, is one closely related to its functions and the unusual character of both indicate the existence of a highly specialized congressional purpose. The reason for the rule that a statutory method for the review of administrative orders is exclusive is to be found in the reluctance of the courts to interfere with a specialized statute designed to effect a specialized result. The higher the degree of specialization, the more applicable becomes the rule. Hence, the unique character and functions of the National Railroad Adjustment Board should render its orders more rather than less exempt from extra-statutory review.

(B) The terms of the Railway Labor Act indicate an intent that the method of review prescribed should be exclusive, both to insure that "final and binding" character which the Act attributes to the orders of the Board, and to insure to employees the special advantages granted them in the course of enforcement proceedings. These advantages, being designed as a means of effectuating congressional intent, cannot be taken away without doing violence to the basic purpose of the Act. Inasmuch as the advantages in question can be realized only in the statutory proceeding, it follows that such a proceeding was intended to be exclusive of all others. Further in this connection, we have shown that the statutory method of review is constitutionally and legally adequate because it imposes legal compulsion only after judicial hearing.

Accordingly, we submit that the Railway Labor Act provides an exclusive remedy for the review of decisions of the National Railroad Adjustment Board or at least a

special remedy designed for that purpose; that non-statutory relief by declaratory judgment cannot be substituted therefor; that the lower courts properly found that they were without jurisdiction to entertain the suit, and that their decision should accordingly be sustained.

FRANK L. MULHOLLAND,
CLARENCE M. MULHOLLAND,
WILLARD H. MCEWEN,
1041 Nicholas Bldg., Toledo, Ohio,

HAROLD C. HEISS,
Keith Bldg., Cleveland, Ohio,

RUSSELL B. DAY,
Keith Bldg., Cleveland, Ohio,

WILLIAM E. WILLIS,
Kellogg Bldg., Washington, D. C.,
Attorneys for Respondents.

Of Counsel:

MULHOLLAND, ROBIE & MCEWEN,
1041 Nicholas Bldg., Toledo, Ohio.

APPENDIX I

EXCERPTS FROM RAILWAY LABOR ACT AS AMENDED JUNE 21, 1934. (U. S. C. TITLE 45, CHAPTER 8.)

GENERAL PURPOSES

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. (U. S. C. Title 45, Section 151a.)

GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (U. S. C. Title 45, Section 151 First.)

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (U. S. C. Title 45, Section 151 Second.)

CONFERENCES FOR SETTLEMENT OF DISPUTES

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties." (U. S. C. Title 45, Section 151 Sixth.)

NATIONAL RAILROAD ADJUSTMENT BOARD

Establishment and Members

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board,'

the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act. (U. S. C. Title 45, Sec. 153, Paragraph First (a).)

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party." (U. S. C. Title 45, Section 153 First (g).)

Divisions

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees. (U. S. C. Title 45, Sec. 153, First (h).)

Jurisdiction

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (U. S. C. Title 45, 153 First (i).)

Hearings

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." (U. S. C. Title 45, Section 153 First (j).)

Neutral Referee

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or

any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees. (U. S. C. Title 45, 153 First (l).)

Publication and Effect of Awards

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute." (U. S. C. Title 45, 153 First (m).)

Majority Necessary to Make Award

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it." (U. S C. Title 45, 153 First (n).)

Orders Directed to Carriers to Apply Awards

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the

sum to which he is entitled under the award on or before a day named." (U. S. C. Title 45, 153 First (o).)

Enforcement and Review of Orders

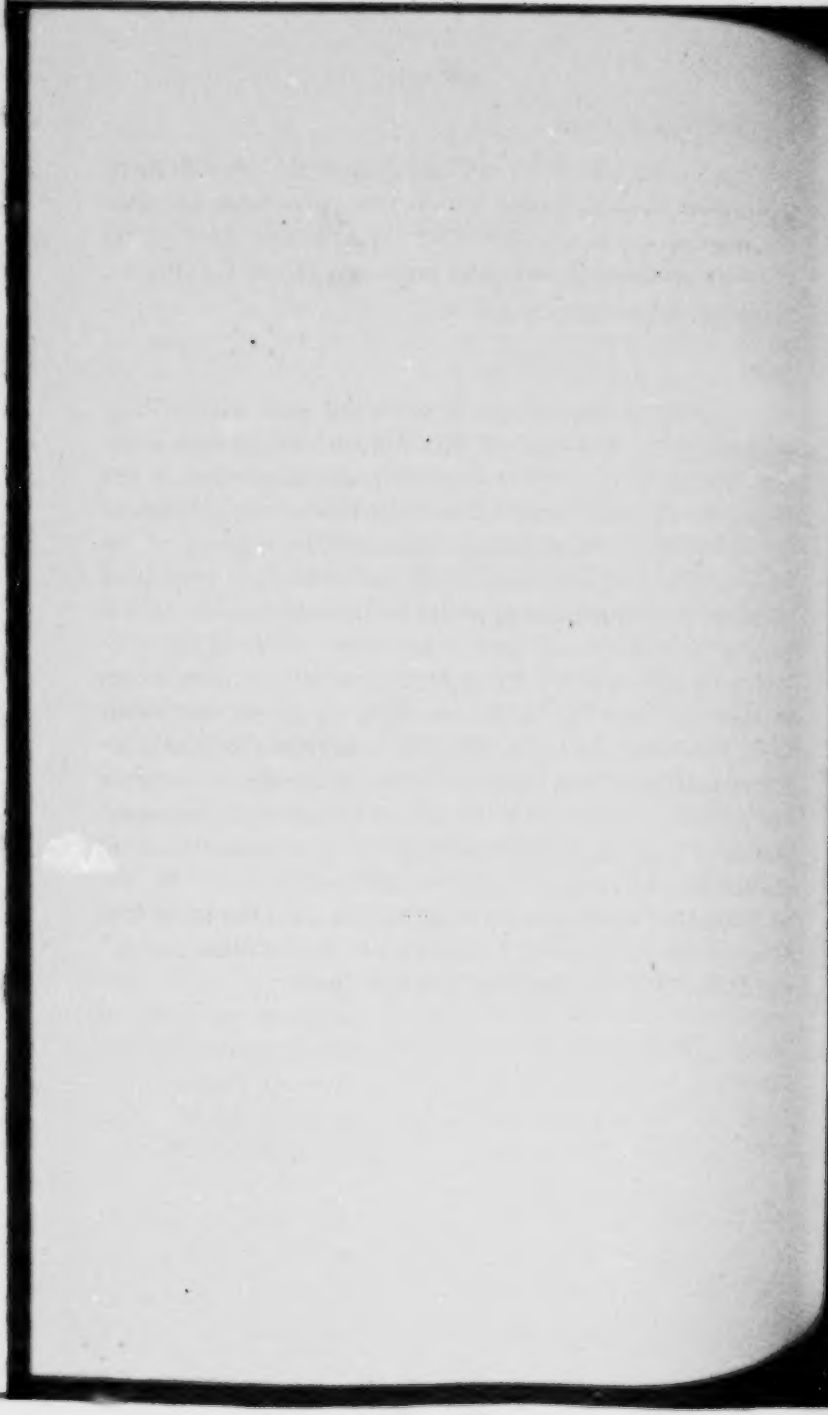
"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The District Courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (U. S. C. Title 45, 153 First (p).)

Limitation of Actions

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after. (U. S. C. Title 45, 153 First (q).)

Rules

"(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group." (U. S. C. Title 45, Section 153 First (a).)



APPENDIX II

EXCERPTS FROM MEMORANDUM OF UNDERSTANDING INCORPORATED IN GENERAL ORDER 13 OF THE FEDERAL DIRECTOR-GENERAL OF RAILROADS ISSUED MARCH 22, 1918

"*It is understood,* That *all controversies growing out of the interpretation or application* of the provisions of the wage schedule or *agreements which are not promptly adjusted by the officials and the employees* on any one of the railroads operated by the Government shall be disposed of in the following manner:

"1. There shall be at once created a commission, to be known as Railway Board of Adjustment No. 1, to consist of eight members, four to be selected by the said regional directors and compensated by the railroads, and one each by the chief executive officer of each of the four organizations of employees hereinbefore named and compensated by such organizations.

"8. The broad question of wages and hours will be considered by the Railroad Wage Commission, but *matters of controversies arising from interpretations of wage agreements,* not including matters passed upon by the Railroad Wage Commission, shall be decided by the Railway Board of Adjustment No. 1, when properly presented to it.

"10. Personal *grievances or controversies arising under interpretation of wage agreements, and all other disputes* arising between officials of a railroad and its employees, covered by this understanding, *will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad* (or some one officially designated by him), *when, if an agreement is not reached,* the chairman of the general com-

mittee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned *shall refer the matter, with all supporting papers,* to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.

"12. In hearings before the Railway Board of Adjustment No. 1, in matters properly submitted for its consideration, the railroad shall be represented by such person or persons as may be designated by the chief operating officer, and the employees shall be represented by such person or persons as may be designated by the chief executive officer of the organization concerned.

"14. In each case an effort should be made to present a joint concrete statement of facts as to any controversies, but the board is fully authorized to require information in addition to the concrete statement of facts, and may call upon the chief operating officer of the railroad or the chief executive officer of the organization concerned for additional evidence, either oral or written.

"15. *All decisions of the Railway Board of Adjustment No.* 1 *shall be approved by a majority vote of all members of the board.*

"16. After a matter has been considered by the board, and *in the event a majority vote can not be obtained, then any four members of the board may elect to refer the matter upon which no decision has been reached to the Director-General of Railroads for a final decision.*"

APPENDIX III

EXCERPTS FROM AGREEMENT ESTABLISHING SOUTHEASTERN REGIONAL BOARD OF ADJUSTMENT UNDER THE PROVISIONS OF TITLE III OF THE TRANSPORTATION ACT OF 1920

"(1) That *all disputes growing out of personal grievances or out of the interpretation or application of the schedules, agreements or practices* now, or hereafter established on the railroads signatory hereto, *which cannot be adjusted by direct conference between representatives of the individual railroad and its respective employees,* shall be disposed of in the following manner:

"(2) There shall be created as soon as practicable a Railroad Board of Adjustment to be known as 'Train Service Board of Adjustment for the Southeastern Region' (hereinafter referred to as the Board), to consist of *eight members; four to be selected by the said railroads, and one each by the chief executive officer of each of the four organizations of employees,* hereinbefore named.

"(7) The Board shall render decisions on all matters in dispute, as provided in Sections 1 and 8 hereof, and when properly submitted to the Board.

"(8) *Disputes* arising between a railroad and its employees covered by this agreement *will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad* (or someone officially designated by him), when, if an agreement is not reached, the Chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of

the railroad and the chief executive officer of the organization concerned shall *refer the matter, with all supporting papers, to the Board,* which Board shall promptly hear and decide the case, giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned, of the time set for hearing.

"In the event that either party to a dispute declines to become a party to a joint submission, as above provided, then either party may refer the dispute to the Board under such regulations as the Board may prescribe.

"On a written petition signed by not less than one hundred unorganized employees of the classes covered by this agreement, directly interested in the dispute, the Board shall hear and decide any dispute covered by this agreement; provided, that no dispute over an interpretation of an existing agreement, rule or practice which has been agreed to or accepted by the management and the duly constituted committee representing the employees parties thereto, shall be considered as a dispute under this agreement.

"(13) *All decisions of the Board shall be approved by a majority vote of the full membership of the Board, and shall be final and binding upon the parties to the dispute.*

"(14) If a dispute has been considered by the Board, *but a majority vote, as provided above, cannot be obtained, then, upon the request of either party to the dispute, the Board shall certify such dispute to the United States Railroad Labor Board for final decision, accompanied by all supporting papers."*

IN THE

Supreme Court of the United States

October Term, 1942

No. 28

THE WASHINGTON TERMINAL COMPANY,

Petitioner,

vs.

F. E. BOSWELL ET AL.,

Respondents.

ADDITIONAL BRIEF OF RESPONDENTS

FRANK L. MULHOLLAND,
1041 Nicholas Bldg., Toledo, Ohio,

CLARENCE M. MULHOLLAND,
1041 Nicholas Bldg., Toledo, Ohio,

WILLARD H. MCEWEN,
1041 Nicholas Bldg., Toledo, Ohio,

HAROLD C. HEISS,
Keith Bldg., Cleveland, Ohio,

RUSSELL B. DAY,
Keith Bldg., Cleveland, Ohio,

WILLIAM E. WILLIS,
Kellogg Bldg., Washington, D. C.,

Attorneys for Respondents.

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ADDITIONAL BRIEF OF RESPONDENTS

Preliminary Statement

The order of the Court restoring this case to the docket for reargument and for the filing of further briefs directs the attention of the parties to four stated questions which we are asked to consider. These questions probe deeply into the nature of the National Railroad Adjustment Board, its decisions and the procedure available for their review. The matters dealt with are such as to cause us to interpret the Court's order as a request to discuss the whole subject fully and to examine its various phases on the basis of such general principles of law as may be applicable.

The ensuing discussion will proceed according to this interpretation of the Court's intent. In our consideration of the questions asked, we will first discuss each in a general way and will then relate the conclusions reached to the special facts of this case.

ARGUMENT

FIRST QUESTION:

Whether Either Party to a Dispute Over Which the Adjustment Board Has Authority Is Precluded From Seeking a Determination of the Dispute by the Courts, Either Before or After Submission of the Dispute to the Board.

Right to Seek Judicial Determination Before Submission to the Adjustment Board

Provisions of the Statute. The language of the Railway Labor Act is inconclusive on this point. It does contain the provision that "disputes *may* be referred * * * to the Adjustment Board." (Section 3 First (i), U. S. C. Title 45, Section 153 First (i).) This language is obviously evidence of an intention on the part of Congress that resort to the Board shall be optional in some sense. The option intended, however, may be that of proceeding with the case or of dropping it. There is nothing in the language which compels the conclusion that an option was intended as between the Adjustment Board and the courts. Under the circumstances, therefore, the statutory language cannot be said to be decisive.

We have examined the congressional proceedings which led up to the passage of the Railway Labor Act and find nothing therein which casts any light on this issue.

It follows that the Court's First Question will necessarily be answered on the basis of general principles of law related to the inherent purposes of the Railway Labor Act.

Doctrine of Primary Jurisdiction—Its Legal Basis. This doctrine, which requires resort to administrative remedies under certain circumstances where such remedies are made available (but not mandatory) by statute, was first announced in the case

of *Texas & Pacific Railroad Company vs. Abilene Cotton Oil Company*, 204 U. S. 426. The cited case was a reparation action brought pursuant to the Interstate Commerce Act and involved the reasonableness of a rate published in accordance with that statute. A defense was made by the carrier to the effect that the only remedy available to the shipper was through a complaint addressed to the Interstate Commerce Commission. The court held that the effect of the court action if allowed, would necessarily be a judicial determination of the validity of the rate. Such a determination could not be of wider application than the territorial jurisdiction of the court, and if courts generally were allowed to enter this field, the whole scheme of uniformity of regulation of interstate rates contemplated by the Interstate Commerce Act would be nullified. The classical statement of the origin of the primary jurisdiction rule is, that a claimant will be required to resort to administrative proceedings (subject to later review in the courts) where such action is required by consideration of uniformity of regulation.

Another reason for the rule has been found in the nature of the issues frequently involved in administrative proceedings. Where such issues are of a complicated or technical nature to the extent that they require for their proper solution, the informed judgment of a board of experts, primary resort to such a board is required. See *Great Northern Railroad Company vs. Merchants Elevator Company*, 259 U. S. 285; *Board of Railroad Commissioners vs. Great Northern Railroad Company*, 281 U. S. 412; *United States Navigation Company vs. Cunard Steamship Company*, 284 U. S. 478; *Rochester Telephone Corporation vs. United States*, 307 U. S. 125; Vom Baur, "Federal Administrative Law," pp. 193-6; Stason, "Timing of Judicial Redress from Erroneous Administrative Action," 25 Minn. Law Rev. 560; 42 American Jurisprudence 698.

This doctrine, though originating in cases involving the Interstate Commerce Commission, has been applied to other agencies of the government as circumstances have required. The primary jurisdiction of the United States Shipping Board was recognized in the case of *United States Navigation Company vs. Cunard Steamship Company, supra.* The rule has also been recognized in certain District Court cases involving labor disputes arising while the National Industrial Recovery Act was in effect. In the case of *Stanley vs. Peabody Coal Company,* 5 F. Supp. 612, it was held that it was necessary to resort to the administrative remedy provided by the Bituminous Coal Labor Board organized under a Code, before taking any action in court. To the same effect, see *Western Powder Manufacturing Company vs. Interstate Coal Company,* 5 F. Supp. 619.*

Thus, the general rule is that an administrative agency established for the purpose of deciding controversies of a certain type will be held to have primary jurisdiction over all such controversies, first, where uniformity of regulation is essential to the realization of the purpose of the statute and such uniformity can be secured only by resort to the administrative agency in question, and second, where the controversies involved are such that they present issues of a technical nature which may be best decided by a special expert tribunal established for that purpose. In the ensuing discussion, we will point out that the National Railroad Adjustment Board falls within both reasons for the rule.

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* The doctrine of primary jurisdiction of administrative agencies in labor dispute cases was recognized by the Norris-LaGuardia, or Anti-Injunction Act, U. S. C. Title 29, Section 108, where the jurisdiction of the federal courts to issue injunctions in labor disputes is limited thus:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Purposes of the Railway Labor Act—Uniformity of Regulation.

As was recognized by this court in the case of *Virginian Railway Company vs System Federation No. 40*, 300 U. S. 515, the purpose of the Railway Labor Act is to prevent labor disputes whose effect may be the disruption of interstate commerce.

The industry to which the Act applies is a highly integrated one. The court is, of course, aware of the extent to which the various units of the American railroad system are physically dependent upon one another for the performance of a nation-wide transportation service. In addition to this physical connection, however, the industry is unified in other respects. Rates and many other operating and financial practices are subject to the centralized control of the Interstate Commerce Commission acting under the Interstate Commerce Act.

An industry-wide annuity system for the benefit of superannuated and unemployed workers is provided by the Railroad Retirement Act (U. S. C. Title 45, Sec. 228a-228r) and the Railroad Unemployment Insurance Act (U. S. C. Title 45, Sec. 351-367), to the support of which all railroads and railroad employees jointly contribute.

Railroad workers are nearly 100 per cent organized on a horizontal basis, in national or international unions. The wages of most classes of employees, with a few minor exceptions, have been standardized throughout the industry, and have moved upward or downward together in response to negotiations and agreements national in scope.*

In addition to wages certain other conditions of employment are established on a national basis. In 1936, 21 labor organizations and the majority of the carriers entered into a joint agreement for the protection of railroad

* For a historical account of these national fluctuations in wages, see the report to the President by the Emergency Board appointed September 10, 1941, under Section 10 of the Railway Labor Act, pp. 10-12, inc.

labor from the adverse effects of consolidation.* In 1941, the policy of granting paid vacations to certain classes of employees was inaugurated on substantially all of the carriers by a single master agreement executed as a result of a report of the 1941 Emergency Board appointed in that year.

Other working conditions of employees are still largely governed by agreements executed by individual carriers and the collective bargaining representatives of the various classes of their employees. Such agreements are effective on a system-wide basis, and in the case of a large railroad, may have an extended coverage territorially and be operative in many states. There is furthermore a high degree of similarity among the various agreements. Certain provisions are considered as standard and are incorporated in most of them.

This standardization in the treatment of railroad employees has not been a fortuitous development but has come about naturally as a result of the integration of the industry, the similarity in the operating conditions under which its various units function, and a unity of representation among employees of the same class. It has been found as a matter of practical experience that a lack of uniformity of treatment of employees performing identical work under identical circumstances for the same or different employers sooner or later breeds discontent and labor unrest.

It is obvious that a lack of uniformity in the rights and duties of employees may be brought about not only by differences in the provisions of collective bargaining agreements but also by differences in the interpretation of agreements which are themselves uniform, or substantially uniform, in their terms.

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* See comment on this agreement contained in the opinion of this court in the case of *United States vs. Lowden*, 308 U. S. 225, 234.

There is ample evidence in the congressional proceedings which transpired prior to the enactment of the Railway Labor Act that the sponsors of that statute were perfectly well aware of this situation and endeavored to make provision for it. The carriers objected to the proposal of a national board of adjustment and suggested instead the establishment of system or regional boards. Mr. Joseph B. Eastman, the Federal Coordinator of Transportation under the Emergency Transportation Act of 1930, assisted in the preparation of the bill and appeared before the committees of Congress in support of it. The suggestion of the carriers was opposed by Mr. Eastman for reasons which will be apparent from the following excerpts copied from his testimony:

> "I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally. As a matter of fact, the same rules are now interpreted in many different ways throughout the country, and that is one reason why grievances which arise remain unsettled, because there is disagreement as to what the same language means and a great variety of interpretations. If we had one board, nation-wide, setting precedents in these matters, I think the tendency would be to establish guides which would enable a great many of the issues to be settled at home." (page 48, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Congress, 2d session, H. R. 7650.)
>
> "Finally, I believe that the consideration of these minor disputes from a national viewpoint instead of a strictly local viewpoint will have advantages which will more than offset its disadvantages. This will be particularly true in the case of interpretations of rules and working conditions. There is, I believe, no sound occasion for the multiplicity of interpretations which now seems to exist, and if some greater degree of uniformity can be attained by national

consideration, the tendency will gradually be to reduce the number of debatable disputes. Precedents will mean something, whereas they now often mean little or nothing." (page 19, Hearings before the Committee on Interstate Commerce, United States Senate, 73d Congress, 2d Session, S. 3266.)

It is true that Mr. Eastman was speaking of a national board in contrast to system or regional boards, and was not referring directly to the courts. System or regional boards, however, at the worst, would affect entire systems or groups of systems. The jurisdiction of the courts would not be even that extensive. Actions seeking the construction of contracts, even though between interstate carriers and their employees fall within the jurisdiction of the state courts (see *Moore vs. Illinois Central*, 312 U. S. 630) unless diversity of citizenship exists. Almost without exception the major railroad systems of the country traverse several states and of course the whole railroad network operates in every state. If collective bargaining agreements are to be subject to interpretation by the courts of the various states, there would be no assurance of uniformity even on the property of a single carrier, and obviously anything like nation-wide uniformity would be impossible.

It must be remembered that the Railway Labor Act did not establish the National Railroad Adjustment Board as an end in itself but as a means to an end. The ultimate purpose was that of providing for the minimization of labor disputes in the railroad industry and of the danger of interruption or impairment of interstate commerce as a result of such disputes. Uniformity of treatment of employees working under similar conditions of employment was recognized by the proponents of the Act as a necessary feature of any system designed to accomplish this statutory purpose. Such uniformity cannot be secured through resort to the courts, but can be secured if the par-

ties are required to submit their cases to the National Railroad Adjustment Board.

We conclude, therefore, that if the statutory purpose of eliminating labor disputes in this industry is to be fulfilled, a uniform standard of interpretation of collective bargaining agreements must be provided through the operation of some single agency. The National Railroad Adjustment Board is the only agency able to bring about such a result. It follows, therefore, that this Board falls squarely within the first requirement of the "primary jurisdiction" rule, *i.e.*, that resort to an administrative agency should be mandatory wherever such a course is required in order to effect uniformity of regulation essential to the attainment of a basic statutory purpose.

Purposes of the Railway Labor Act—Technical Questions Requiring Decision by Expert Administrators.

As noted above, where the subject matter to be considered in any controversy is so technical or complicated as to require specialized information on the part of the tribunal handling it, the doctrine of primary jurisdiction of administrative agencies is peculiarly applicable. Cases involving the interpretation of railroad collective bargaining agreements clearly fall within this reason for the rule.

As stated by Mr. Lloyd K. Garrison in his article, "The National Railroad Adjustment Board, A Unique Administrative Agency," 46 Yale L. J. 567*

> "The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making."

* Reproduced in document "Inquiry of Attorney General's Committee on Administrative Procedure, Relating to the National Railroad Adjustment Board," Appendix pp. 110-135. Copies of this document were submitted to the court by petitioner's counsel during the first hearing.

The rules of the industry, insofar as labor relations are concerned, have been generally incorporated into collective bargaining agreements. The interpretation of such agreements is a complicated task, the complication being due to a number of factors. In the first place, it must be borne in mind that collective bargaining on the railroads has been in progress since well back in the last century. Unlike most long continued contractual relationships, this one, until recently, has been conducted without any considerable assistance from attorneys or courts. Collective bargaining agreements were considered by both parties to depend for their enforcement upon economic rather than legal sanctions. Presently existing collective agreements, therefore, are seldom set up in the form of comprehensive contracts. Their language is not that of the lawyer but of the railroader. Expressions of consideration and mutual obligation are absent. Often these agreements are incomplete and must be interpreted by reference to the whole underlying history of labor relations as embodied in earlier agreements or in negotiations, disputes, lay interpretations, compromises, and the accepted but unwritten customs of the industry. For example, seniority rights are among the most prized rights of railroad employees. "Seniority" is recognized in almost every collective agreement, yet we have never seen such an agreement which purports to define the term, the obvious reason being that its meaning is so well understood that definition is considered unnecessary. (The contract involved in this case, which is printed in the record at page 33, *et seq.*, will illustrate these points.)

One prominent commentator, when speaking of the National Railroad Adjustment Board, has made the following statement as to the nature of the questions presented to it:

> "One may ask, is it necessary to maintain such elaborate machinery for the interpretation of agreements? The answer is yes, and as I shall attempt to show, the machinery is not quite elaborate enough.

There are in existence on the 859 carriers covered by the Railway Labor Act over 3,000 separate agreements with labor organizations, of which over 2,300 are on the Class I railroads. Each of these agreements consists of many clauses and thousands of words, defining in language not always clear, jobs, duties, hours, overtime, seniority rights, discipline procedure, leaves, vacations, wage rates and so forth. Disputes are constantly arising; what does this particular clause mean as applied to this particular set of facts? Or, if the meaning is clear, what are the facts which give rise to this particular claim? Sometimes both the meaning and the facts are in dispute. There may be precedents but they too are often in dispute.

"Someone has got to decide these disputes, after they have been handled all the way up to the top of the carrier-union hierarchies and no agreement has been reached. They cannot be left to fester. There are too many of them and the stakes are too great. Law courts are not the answer. There must be tribunals specially adapted to the requirements of the industry, and able to work swiftly, simply, and expertly."*

The regular members of the Adjustment Board are railroad officials and officials of railroad labor organizations. They are familiar from long experience with the language and background of railroad labor agreements and with the customs of the industry. Whether an individual case is decided by these regular members alone or with the assistance of an outside referee, nevertheless the services of technically expert administrators are at all times available to advise and assist in the decision.

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* Garrison, "Labor Relations in the Railroad Industry," reprinted on page 104 of Appendix to a document entitled "Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board," supplied to the court by counsel for the petitioner during the original hearing.

Further see a discussion by this same author in his article, "The National Railroad Adjustment Board, A Unique Administrative Agency," reprinted in the Appendix referred to above, p. 110. The excerpt to which the court's attention is directed is on pages 125-129.

Hence, we submit that the second basis of the primary jurisdiction rule is met, *i. e.*, that resort must be had to an available administrative agency where the character of the controversy is such that the services of techincally expert administrators are required for its solution.

Summary Summarizing the above discussion, we have seen that the primary jurisdiction doctrine is particularly applicable to situations where uniformity of regulation is essential, and can be secured only by requiring all cases to be submitted to a central administrative agency, and further, where the character of the issues submitted is such as to call for a degree of technical knowledge not possessed by the courts. Both of these factors being operative in the case of the National Railroad Adjustment Board, it follows that the doctrine of primary jurisdiction is fully applicable to this tribunal.

Our original brief was predicated upon the assumption that the decision of this court in the case of *Moore vs. Illinois Central Railroad*, 312 U. S. 630, precluded any contention on our part to the effect that the procedure established by the Railway Labor Act for the adjustment of certain types of disputes between carriers and employees was an exclusive procedure in its administrative phase. Even on this assumption, however, we pointed out that the judicial phase of the statutory procedure should be considered as exclusive and as precluding any non-statutory review at the suit of a carrier for the reason that any other conclusion would deny to the employees certain rights which are granted to them by the Railway Labor Act, which are essential features of the purpose of that statute, and which are exercisable only in the course of statutory review actions. Obviously if it is now held that the statute intended to establish in the National Railroad Adjustment Board exclusive jurisdiction over the type of disputes with which it

was established to deal, it follows even more conclusively that the whole statutory plan must be followed, without deviation, to its conclusion, and that an extra-statutory method of review is not available to a carrier against which an award has been issued.

Analysis of Decision Moore vs. Ill. Central

We realize, of course, that the above conclusion is not in conformity with that of this court in the case of *Moore vs. Illinois Central Railroad Company*, and we feel accordingly that we should examine briefly the basis upon which that decision is predicated.

In the course of its opinion, the court called attention to the fact that Section 3 First (i) of the Railway Labor Act "provides no more than that 'disputes may be referred * * * to the * * * Adjustment Board'." The court contrasts this language with that of the earlier act of 1926, which used the word "shall" in connection with the submission of disputes to adjustment boards (whose establishment was authorized and recommended but not compelled by that statute), but concluded that the change in phraseology was designed to effectuate a clarification of statutory purpose rather than a change thereof. The court said accordingly:

> "* * * neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature." (Pages 635-6.)

While this conclusion is entirely accurate with respect to the provisions of the Transportation Act of 1920, Title

III (41 Stat. L. 469), and the Railway Labor Act of 1926 (44 Stat. L. 578), definite elements of legal compulsion were incorporated into the Act of 1934.* The Transportation Act of 1920 provided very briefly for the voluntary establishment of adjustment boards. The parties undoubtedly had the right to do this in any event, and the whole effect of the statute was to place a governmental stamp of approval on the procedure and to correlate the activities of such boards, if formed, with those of the United States Railroad Labor Board. No provision was made as to how the members of such boards were to be selected, the procedure under which they were to operate, or the effect which should be given to their decisions.**

The 1926 statute went considerably farther than the Transportation Act in the particularity with which it outlined the Adjustment Board process, but did not compel the establishment of any such boards. It did provide that "boards of adjustment shall be created by agreement," and stated what such agreements should contain if made, but did not actually compel them. Under this statute, bi-partisan boards consisting of representatives of each side in equal numbers were specified, procedure was outlined, formal decisions were mentioned, and it was provided that such decisions should be "final and binding upon both parties to the dispute."† The Railway Labor Act of 1926, therefore, may be summarized as saying to the carriers and to the employees, "You do not need to create adjustment boards, but if you do create them, your contract must contain certain provisions." It is obvious that no real compulsion was exerted but that the statute merely declared

* The historical development of the adjustment board idea is traced in respondents' original brief, pages 20-31, and will not be repeated here.

** For text of this portion of the Transportation Act, see footnote on page 27 of respondents' original brief.

† For the text of this portion of the Railway Labor Act of 1926 see footnote, page 29, of respondents' original brief.

federal policy which it was hoped would be effectuated by private contract.

The significance of the change made by the 1934 Act may best be appreciated by a consideration of the facts which made change necessary. The employees had become dissatisfied with the operation of a purely voluntary system of adjustment boards, and the investigations of the Federal Coordinator of Transportation, Mr. Eastman, had established that there was sound basis for this attitude. In sponsoring the bill before Congress, Mr. Eastman explained the weaknesses in the existing system thus:

> "The Railway Labor Act now provides that boards of adjustment 'shall be created by agreement between any carrier or groups of carriers, or the carriers as a whole, and/or their employees.' You will note that the duty thus imposed is definite and positive. The law also prescribes the procedure under which adjustment boards shall act, and makes their decisions final and binding on both parties to the dispute."
>
> * * * * * *
>
> "The fact is, however, that this obligation which the law imposed has largely been disregarded. No national boards of adjustment have been created, and there are only four regional boards, and all but one of these were in existence prior to the Railway Labor Act. These regional boards are confined to the train service, and by no means all of the carriers participate in them. There are a considerable number of system boards of adjustment in various of the crafts, but these also are sporadic, and some railroads participate in no boards of adjustment whatsoever."
>
> * * * * * *
>
> "Another difficulty with the present law, even where an adjustment board has been established, is that, although its decisions are final and binding upon both parties, there can be no certainty that there will be a decision. The two sides are now evenly represented on these boards, and hence deadlocks are a very distinct possibility. Not only are they possible,

but they have occurred in a large number of cases, and of late there has been a continually growing tendency toward such deadlocks. The number now existing runs into the hundreds."

* * * * * *

"Provision is also made so that deadlocks will be impossible. When the regular members, who will be equally divided between the two sides, disagree, they must call in a neutral member appointed by the mediation board to decide the case. The willingness of the employees to agree to such a provision is, in my judgment, a very important concession and one of which full advantage should be taken in the public interest. I regard it as, perhaps, the most important part of the bill." (Pp. 45-47, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Congress, 2d Session, H. R. 7650.)

Thus, the new Act which was proposed was designed to accomplish two significant results: first, the adjustment board procedure was to be continued in the form of a national board whose establishment was mandatory (voluntary boards were to be permitted but only by mutual consent of the parties which could be withdrawn by either on 90 days' notice), and second, deadlocks in this national board were to be prevented by the appointment of neutral referees. These two considerations, particularly when supported by the enforcement provisions of Section 3 First (p), added for the first time a definite compulsory element to the adjustment board concept.

It should be noted that the 1934 Act was able to state many of the obligations intended to be imposed in language substantially the same as that used in the 1926 Act, where the required conditions of contracts for the establishment of adjustment boards are set forth. This is explained by the fact that both acts contemplated legal obligations, the one, however, to be imposed by private contract, the other, by the statute itself. The essential difference obviously

lies in the fact that, while the one Act left the door open for either of the parties to subject itself to legal obligation or not, as it chose, the later statute gave no such option.

Thus, the Railway Labor Act of 1934 added features of decision and compulsion to a type of proceeding which theretofore had been purely negotiative and voluntary. The opportunity is still given to utilize the voluntary procedure with mutual consent. The failure to secure such consent under the 1926 Act resulted in an entire absence of any adjustment procedure on the carrier involved, while today such failure results in subjecting the parties to the mandatory procedure of the National Railroad Adjustment Board. It is respectfully submitted, therefore, that the 1934 Act did alter the basic characteristics of the system theretofore existing and that insofar as the decision in *Moore vs. Illinois Central* is predicated upon a contrary hypothesis, it should be reconsidered by the court at this time.

In partial answer to the Court's First Question, therefore, we conclude that the primary jurisdiction rule is applicable to the Adjustment Board, and that neither party to a dispute which might be submitted to that Board may seek a judicial determination of such dispute prior to such submission.

Right to Seek Judicial Determination After Submission to the Adjustment Board

In our original brief filed herein, we advanced the proposition that a carrier against whom an award of the Adjustment Board is issued may not, as plaintiff, apply to the courts for a re-determination of the dispute. Such a carrier has access to the courts but only as a defendant in an enforcement action brought under Section 3 First (p). The reasons supporting this position, having been

fully developed in our former brief, will not be repeated here.

The right of employees to resort to the courts to enforce an award favorable to them is specifically granted by Section 3 First (p) and requires no discussion. As to the possible right of employees to seek judicial relief from an unfavorable award, see our discussion of the Court's Fourth Question herein, in the course of which it will be pointed out that if employees are required to take their disputes to the Adjustment Board and have no right of election in the first instance between the administrative procedure offered by the Act and judicial relief in the courts, then under the Federal Constitution, they probably have a right to judicial review.

As to the second phase of the First Question, therefore, it is our position that after a case has been submitted to the Adjustment Board, a carrier may secure, but may not seek, judicial review; that employees may seek judicial relief in an enforcement action wherein the legal rights of both employees and carrier will be considered, and may possibly be able to secure judicial review of an award against them, their right being dependent upon the answer finally reached as to the question of whether the primary jurisdiction rule does or does not apply to this Board.

Intermediate Statement

The answers to be given to the second, third and fourth questions asked by the court must depend in large measure upon the decision reached as to the first question. The rights of parties to resort to the courts and the scope of judicial review where these parties are required to submit themselves to administrative procedure in the first instance differ materially from the rights which may be properly asserted by them if they had the privilege of electing whether to follow the administrative or the judicial channel.

We have taken the position in this brief that no right of election exists but that the doctrine of primary jurisdiction is applicable to the National Railroad Adjustment Board. In the ensuing discussion, we will point out the consequences of this position in relation to the other three questions of the court, but will also outline the conclusions which we believe would necessarily follow were the contrary view to be accepted.

We feel that the discussion of the remaining questions suggested by the court may be more clearly presented by changing somewhat their order of consideration. We will accordingly treat the fourth question next, and follow this by a discussion of the third and second questions, in that order.

FOURTH QUESTION:

The Effect of the Words "Final and Binding" in Section 3 First (m) Upon the Right to Resort to the Courts and Upon the Scope of Judicial Review, (a) During the Two-Year Period, and (b) After Expiration of the Two-Year Period.

In considering this question, we wish, in the first place, to direct the court's attention to certain general considerations which will aid in the correct interpretation of the statutory phrase in question. Thereafter we will consider this phrase in relation to, *first*, its effect in relation to any right of review which may be open to employees faced with an unfavorable award of the Board; *second*, its effect as restricting a carrier's right of review to that provided in an enforcement action brought under Section 3 First (p); *third*, its effect in limiting the scope of review in an enforcement action, and *fourth*, its effect after the two-year period of limitations has expired.

GENERAL CONSIDERATIONS REGARDING INTERPRETATION

The legislative proceedings prior to the enactment of the Railway Labor Act serve to cast some light upon the sense in which the phrase "final and binding" was used by Congress. In the hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 73d Congress, 2d Session, H. R. 7650, Mr. Joseph B. Eastman discussed at some length the significance of this expression. The entire discussion is too lengthy to be copied here in full, but is set forth in an appendix to this brief. The most significant short excerpt is to be found on page 60 of the transcript of the hearings, and reads as follows:

> "Mr. Cooper. Do I understand this paragraph then on page 17, in which it says, 'the awards shall be final and binding upon both parties to disputes,' would that prevent a railroad employee or an organization from striking, if they saw fit? Would it be a violation of the law if they did that?
>
> Mr. Pettengill. Could an injunction issue to prevent them from doing it?
>
> Commissioner Eastman. I cannot tell you what the legal procedures would be in enforcing the award, where it is against the employee. Paragraph (p) covers the case where a carrier does not comply with the order of the adjustment board.
>
> Mr. Cooper. Would it apply to either carrier and/or employees? Now, if we go that far are we not writing something new into the law of the land to deprive the employees of rights which they already had?
>
> Commissioner Eastman. Well, as I say, you have exactly similar provisions in the present labor act with respect to decisions by adjustment boards and where they agree to arbitration, and this law is in effect an agreement on the part of the parties to arbitrate all of these minor disputes.
>
> The Chairman. Was that not one of the reasons, to try to keep down strikes to get people together?
>
> Commissioner Eastman. Yes. It is a very im-

portant part of it. The willingness of the employees to agree to a provision of that sort seemed to me to be a very important and praiseworthy thing."

It appears from this discussion that the question of the *employees'* right to attack an unfavorable award of the Adjustment Board was considered almost entirely on the assumption that any action which they might take would be economic rather than judicial in nature. It was Mr. Eastman's conclusion that the employees were willing to agree to abide by any awards of the Board and would not resort to strikes against adverse awards. This concession seemed to him so significant that the question of judicial review at the suit of employees was scarcely mentioned.

It may fairly be concluded, therefore, that it was the intent of Congress that awards of the Adjustment Board were to be absolutely final and binding upon the parties in an *economic* sense. As far as the language used in Section 3 First (m) is concerned, there is nothing to indicate that Congress did not also intend to impute to such awards absolute legal finality as well. However, it is well established that such a degree of finality cannot ordinarily be attached to any administrative finding where *quasi*-judicial issues are involved and legal rights determined without infringing upon the requirements of the Federal Constitution.* Further it is well established as well that no statute will be interpreted in such manner as to cast doubts upon its constitutional validity where another interpretation is possible.**

Accordingly, in light of the rather sweeping language of the statute, and in light of the legal principles above stated, it may fairly be concluded that it was the intent

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* See *Ex Parte Young*, 209 U. S. 123; *Wadley Southern Ry. Co. vs. Georgia*, 235 U. S. 651; *Natural Gas Pipeline Co. vs. Slattery*, 302 U. S. 300.

** See *Northwestern Bell Telephone Co. vs. Nebraska State Railway Comm.*, 297 U. S. 471, 480, and *Richmond Screw Anchor Co. vs. United States*, 275 U. S. 331, 346.

of Congress to endow the awards of the Board with the highest degree of finality consistent with the requirements of the Constitution. These requirements appear to differ materially according to whether resort to the Board is considered as elective or compulsory in the first instance. We will, therefore, develop the various factors relating to this problem from both points of view.

Effect of Phrase "Final and Binding" in Relation to Right to and Scope of Review of Award Unfavorable to Employees

If employees have an option as to whether they shall invoke the services of the Adjustment Board or the processes of the courts and elect to pursue their administrative remedy, then they may properly be held to have waived their right to a judicial review. If they secure an award against the carrier but not as favorable a one as they considered themselves entitled to receive. They may not ignore the award and sue on the contract, but are limited to their statutory action for the enforcement of the award. This conclusion appears to follow inescapably from the decision of this court in the case of *Baltimore and Ohio Railroad Company vs. Brady*, 288 U. S. 448. The cited case arose out of a reparation award made by the Interstate Commerce Commission where, in an enforcement action, the claimant endeavored to recover a sum greater than the amount of the award.* The court said that "Having elected to seek relief through the Commission, plaintiff is not entitled to recover more than the amount of the award" (page 457), and further that the plaintiff was "bound by the award" (page 458).**

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* It will be recalled that the provisions of the Railway Labor Act for the enforcement of Adjustment Board awards are practically identical with those of the Interstate Commerce Act for the enforcement of reparation awards.

** To the same effect see *Illinois Central R. Co. vs. Peery*, 242 U. S. 288, and *Terminal Warehouse Co. vs. Pennsylvania R. Co.*, 297 U. S. 500.

If a claimant is thus "bound" and may not challenge an award in his favor because of alleged insufficiency, it follows logically that he would be equally bound by an award which was entirely adverse to him. It appears, therefore, that if the employees have an election, choose to follow the administrative course, and consider themselves aggrieved by the result, they are nevertheless bound thereby and may not seek relief in the courts.

If, however, we take the position that the employees have no election in the first place, but are required to take their disputes to the Adjustment Board, the reasons underlying the above stated conclusion do not apply. If an award of the Board were to be considered as absolutely final and binding under such circumstances, the employees would be denied all opportunity to test asserted legal rights in court, and doubts would be cast upon the constitutionality of the statute. Accordingly, following our original premise, that Congress intended that awards should have as high a degree of finality as constitutionally possible, it follows that, if the primary jurisdiction doctrine is applied, awards of the Board could be construed as possessing administrative finality only. Administrative finality has been defined by this court as requiring that "even when resort to courts may be had to review a commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised." *Rochester Telephone Corporation vs. United States*, 307 U. S. 125, 139-140.

Under this theory, therefore, employees would be enabled to secure judicial review of an unfavorable award or of one less favorable than they had hoped. The statute makes no provision for such a review and accordingly the employees would be able to invoke any form of judicial

procedure which would be appropriate to test the award and to accord them the relief which they might claim. In such an action, the plaintiffs would be subject to the rule of administrative finality and could not prevail unless they were able to establish that the decision of the Board violated their constitutional rights, exceeded the statutory authority of the Board, or was rendered upon inadequate proof.*

While it is theoretically possible for a carrier to present cases to the Adjustment Board, as a matter of fact the carriers do not do so. The reason is easily understood. It is the carriers who apply the collective bargaining agreements on their properties and interpret them in the course of such application. Naturally no carrier is likely to protest its own decisions or precipitate a dispute regarding them.

It is probably academic, therefore, to consider the situation in which employees find themselves in a case where a carrier has taken a dispute to the Adjustment Board. Inasmuch, however, as the court has invited us to give full consideration to all legal possibilities, we will discuss this question briefly.

As we noted above, in order to consider the awards of the Board as possessing absolute finality, there must exist a right of election in the party against whom the awards are issued. Where a carrier presents a case to the Board, naturally no such election is made by the employees. We conclude, therefore, that in such a situation, the employees would have a right to judicial review subject to the limitations of the doctrine of administrative finality.

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* It should be stated here that railroad labor has never insisted upon the existence of a right to review the awards of the Adjustment Board upon suits filed by employees. The above discussion, therefore, is designed more for the sake of completing the legal picture than for that of pressing a vital claim.

EFFECT OF PHRASE "FINAL AND BINDING" AS RESTRICTING A CARRIER'S RIGHT TO REVIEW TO THAT AVAILABLE IN A STATUTORY ENFORCEMENT ACTION

The normal controversy which develops in connection with an Adjustment Board award arises when the award is against the carrier and the latter refuses to comply. Under such circumstances, to what extent is the award final and binding in connection with judicial review proceedings?

Following the same line of reasoning as that advanced above in the case of the employees, it might be plausibly argued that if a carrier had elected to pursue an administrative course by submitting a case to the Adjustment Board, it would be absolutely bound by the results. This conclusion would follow were it not for the fact that the statute provides that awards are not to be self-enforcing against the carriers, and must be enforced, if at all, in actions specially provided for that purpose. In the course of such an action judicial review may be had. The carrier is thus given the option by statute to ignore the award, if it so desires, without legal consequences to itself, and to stand upon its legal rights and await suit. No distinction is made by the statute between situations where the adverse award has been rendered as a result of the carrier's own invocation of the Board's services or where it resulted from a proceeding instituted by employees. The reason is probably to be found in the fact that the carriers were not expected to resort to the Board to any great extent and the facts reveal that this expectation was justified.

Accordingly, we conclude that as to awards against carriers, no difference in the scope of review nor in the degree of finality of such awards was contemplated by the statute, depending upon whether the carrier or the employees presented the dispute to the Board. If no such

difference was intended, it follows that the Board's award in any case must be accorded no greater degree of finality than it would possess in a case where no election of remedies was possible in the first instance. Otherwise stated, we conclude that the degree of finality of such an award as against a carrier will not be governed by the answer to the court's first question, but that this issue must be decided as though the doctrine of primary jurisdiction applied.

It will be remembered that, as to employees, we concluded that it was the intent of Congress to give to the awards of the Board the highest degree of finality consistent with constitutional limitations. If such awards were self-executing without the necessity of judicial enforcement proceedings, the Constitution could probably be satisfied only by permitting some form of non-statutory review at the suit of a carrier. Inasmuch, however, as the awards of the Board have no legal effect until such an effect is given them in an enforcement action, the constitutional rights of the carriers may be fully protected in such an action.

The above discussion has been devoted primarily to a consideration of the significance to be attached to the phrase "final and binding" during the two-year period provided by Section 3 First (q). We have concluded that Congress intended this expression to render the awards of the Adjustment Board as nearly final as is permissible under the Federal Constitution. If the party asserting a right of review has enjoyed an election in the first instance between administrative and judicial procedure, he may properly be held to have waived his right to judicial determination. If so, he is bound by the award which he sought and secured without any right of review unless such a right is provided specifically by statute. No such provision is made as to employees but carriers are secured a judicial

review by Section 3 First (p) in any event. As to one having no election of remedies, administrative finality only may be imputed to an award. Carriers may secure judicial review in the course of suits filed under Section 3 First (p); hence, there is no constitutional reason for according them added opportunity of review through non-statutory actions. If, as we have concluded, it was the intent of Congress to give to awards of this Board finality up to the limits of constitutional propriety, then the opening up of a non-statutory method of attack not required by the Constitution robs the awards of the degree of finality contemplated by the statute.

We have already pointed out in our former brief (pages 44-47, inc.) that Section 3 First (p) of the Act attaches to awards of the Board certain procedural consequences, which may be realized only in the course of a statutory enforcement action. These consequences are such as to place a carrier resisting enforcement at a disadvantage and their obvious purpose is to discourage such resistance. We do not propose to discuss this point again at length, but merely call the court's attention to the fact that the statutory provisions in question establish a measure of what might be termed practical finality for the awards of this Board in enforcement actions, and are hence relevant in connection with any interpretation made of the phrase "final and binding." It is apparent that if means of review other than that provided by statute are made available to carriers for the purpose of testing the propriety of awards, this "practical finality" will be lost and a degree of finality attributed to the awards lesser in extent than that contemplated by Section 3 First (m).

Effect of Phrase "Final and Binding" as to the Scope of Review Available in a Statutory Enforcement Action

In addition, however, to the effect which the words "final and binding" have in preventing a carrier from prosecuting a non-statutory review action, they have also an added effect upon the scope of judicial review in enforcement actions. We concluded above that in an action which might be brought by employees, they would necessarily give to an award of the Board administrative finality and we submit that they have the same effect in an enforcement action. This contention, of course, brings us face to face with the language of Section 3 First (p), where it is provided that an enforcement action "shall *proceed* in all respects as other civil suits, except that *on the trial* of such suit the findings and order of the division of the Adjustment Board shall be *prima facie evidence of the facts* therein stated, and except that the petitioner shall not be liable for costs in the District Court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, * * *. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

The phrase *"prima facie"* is, of course, the most significant one in the above quotation insofar as our present discussion is concerned, but the balance of the statutory provision is quoted as showing the general nature of all of the restrictions which are placed upon enforcement actions. It is apparent that the provisions in question are designed as rules of procedure. They govern the "trial" of such cases, establish a rule of evidence and relate to the administration of the court in the matter of costs and attorney

fees. They are not intended to have substantive effect as to the scope of judicial review.

Were the phrase "*prima facie*" to be considered alone without reference to the provisions of Section 3 First (m), which attaches finality to the awards of the Board, it might be considered as substantive. The words "final and binding," however, are so clear in their meaning as to take precedence over other language which can be interpreted as purely procedural. It is obvious that the same award cannot at the same time be both final and binding, and *prima facie* in a substantive sense. In order to avoid an otherwise serious conflict in meaning between the two phrases, therefore, it is necessary to interpret the one as substantive, the other as procedural. Considered in this light, the "*prima facie*" provision is effective merely to govern the burden of proof, the weight of the evidence, and the order of procedure in an enforcement action. The court, however, in considering the merits of the case, must still accord to the awards of the Board the effect prescribed by the rule of administrative finality, and may not set such an award aside unless the Board has exceeded its constitutional power or statutory authority, or has proceeded "without regard to the basic prerequisites of proof."*

In summary, therefore, it is our conclusion that the phrase "final and binding" has two definite legal effects in connection with the rights of judicial review during the

* Section 3 First (m) provides for finality of awards of the Adjustment Board "except insofar as they shall contain a money award." It should be noted that the statutory exception is not directed against all terms of such awards as may incorporate directions for the payment of money but is limited to the money features alone. Thus, the *amount of money* due is the only factor which is not accorded finality and which would presumably be open to independent investigation on the part of the court. All other items of such awards are given the same degree of finality as in other cases. Accordingly, we do not consider the exception as being a matter of any considerable significance in determining the effect of this provision upon the availability and scope of statutory review, save only on the question of the amount of damages to be granted a claimant.

two-year period provided by Section 3 First (q). In the first place, it limits the types of procedure by which such review may be secured, to those required by the Constitution, or specifically provided by the statute. As to employees, this means that if the primary jurisdiction doctrine does not apply, they have no right to judicial review of awards sought by them, while if it does apply, or if the right of election is exercised by the carriers, then they probably have a right to such review. As to the carriers, there is no constitutional requirement for review because the awards of the Board are not self-enforcing and accordingly, they should be limited to the statutory method provided. The second legal effect of this phrase is that of confining the scope of any judicial review which may be secured within the limits of administrative finality and thus of restricting the issues open to the consideration of a review court to those of constitutional right, compliance with the statute, and the fundamental prerequisites of proof.

Effect of Phrase "Final and Binding" After the Two-Year Period Has Expired

As to the question of the finality of awards of the Adjustment Board after the two-year period of limitation has expired, in relation both to the right to resort to the courts and the scope of judicial review, we believe that our position will be more easily explained after we have discussed the Court's Third Question, which deals with the general effect of the two-year period of limitation and, therefore, will defer any consideration of this point until a later stage in the brief. See the note on page 38 for this discussion.

THIRD QUESTION:

The Effect of the Expiration of the Two-Year Period Specified by Section 3 First (q) Upon the Right of Either Party to the Dispute to Obtain a Determination of It in the Courts.

The exact language of Section 3 First (q) is as follows:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after." (U. S. C. Title 45, Section 153 First (q).)

Obviously any enforcement action brought pursuant to Paragraph First (p) of Section 3, is "based upon the provisions of this section" within the meaning of the above quoted language, and must be brought if at all within two years of the effective date of the award and order sought to be enforced. Petitioner, in its brief, argues that an enforcement action is the only one which can be subject to this provision. This position appears to us to be clearly untenable. If Congress intended to so limit the operation of Paragraph (q), it could easily have done so by stating expressly that it referred only to actions based on awards of the Board, to enforcement actions, to actions based on Section 3 First (p), or some similar phraseology. The fact that it did not so restrict the coverage of this paragraph but chose to apply the limitation it created to all actions "based on this *section*," is evidence of the existence of a broader intent. The Adjustment Board is established by Section 3 of the Railway Labor Act. Its jurisdiction, its procedure, the legal effect of its awards are all governed by Section 3. It is certainly not unreasonable to conclude that any action designed to test the validity of any such award is "based upon the provisions" of this section.

In our discussion of the Court's Fourth Question above, we have considered the possibility that employees

may be able to bring an action for judicial review of an award unfavorable to them. If the employees may indeed do so, it is our conclusion that such an action would be as much subject to the two-year period of limitations as an enforcement action brought under Section 3 First (p).

It follows, therefore, that an award and order of the Adjustment Board would be subject to neither judicial enforcement nor attack by suit filed by the employees more than two years after its effective date. The question still remains, however, as to the rights of the parties to secure a judicial determination of the *dispute* out of which the Board's award arose after the expiration of this two-year period.

Before attempting to answer this question, it is essential that we have a clear understanding as to the meaning of the word "dispute." It is clear that the statute does not employ this term to refer to a mere disputation or disagreement. Section 3 First (i) of the Act provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements * * * including cases pending and unadjusted on the date of approval of this Act, * * * may be referred * * * to the * * * Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." This language clearly indicates that the word "dispute" was used to refer to a controversy analogous to a case in court, arising between adversary parties, growing out of existing facts and presenting definite and specific issues for decision.

Thus, while the word "dispute" may in ordinary usage refer to any disagreement between individuals, this statute attaches to it a more limited and specific meaning. In consequence, it is entirely possible that a difference of opinion may exist between a carrier and its employees as

to the interpretation of an existing contract which disagreement may give rise to a single dispute or to a series of disputes.

When a "dispute," in the statutory sense, is referred to the Adjustment Board by the employees, and a favorable award and order is secured, it is our understanding of the statute that the employees are thereafter limited in their choice of judicial relief to an action to enforce, or perhaps, to set aside *the award*. As we have already pointed out in our discussion of the Court's Fourth Question, employees who seek and receive an award from the Adjustment Board are bound by such an award, however distasteful it may be to them. This binding force is absolute, if they have sought administrative relief as a result of the exercise of the right of election between it and a judicial remedy, while if they have no such election, the binding force of an award is limited to the requirements of administrative finality and it is subject to judicial review. In either case, however, the employees' opportunity for judicial relief extends only to the enforcement or the review *of the award*. If the employees lose their right to enforcement by failure to file suit, the award is terminated, and the "dispute" is terminated with it. If employees fail to protest an unfavorable award in the courts for two years (assuming that they have the right to make such a protest) the award becomes final and again the "dispute" comes to an end. The employees have no further opportunity to submit it to judicial determination because it no longer exists in a legal sense.

While we have approached this question from the point of view of legal actions available to employees after the two-year period has expired, the same conclusions follow as to the carriers. Where a carrier has had an award issued against it with which it has not complied for two years, it cannot be compelled to comply by suit filed there-

after. Hence it cannot seek a judicial determination of the original dispute because that dispute is no longer an active controversy sufficient to confer jurisdiction upon the courts.

Where an award in favor of a carrier has become final through failure on the part of the employees to seek a review (if such review is available), the carrier obviously cannot file a judicial action after the two years because it has no basis for complaint. The winning party cannot appeal.

Our conclusion is therefore that after the expiration of the two-year period, neither party to a "dispute" which has been submitted to the Adjustment Board may seek a judicial determination of it.

We have limited the above discussion to a consideration of the term "dispute" in the technical sense in which it is used in the Railway Labor Act. We are not oblivious of the possibility that the court may not have intended to so limit the word in its question.

As was noted above, it is entirely possible that a single disagreement between carrier and employees regarding the interpretation to be given to some portion of their contract may lead not to a single dispute but to a series of them. This case presents such a situation. Petitioner and respondents are in disagreement as to the meaning of their contract. The petitioner has applied it according to its interpretation. The respondents have presented claims based upon their interpretation. Certain of those claims were consolidated into a "dispute" and submitted to the Adjustment Board. An award was issued. The carrier refused to comply. Two years have elapsed. According to the conclusions above developed, the original dispute is now ended. We do not believe that either it or the individual claims of which it was composed could now be made the basis of judicial action by anyone. However, if further claims have been made since the expiration of the two-year

period, these could be made the basis of a *new dispute.* Such a dispute could be submitted to the National Railroad Adjustment Board by either party. It could also be submitted to the courts if it is held that the primary jurisdiction rule does not apply as to this Board, or if the courts should decide to make an exception to this rule in this peculiar sort of situation. As we interpret the statute, however, this would be the only way in which a disagreement between carrier and employees, once passed upon by the Adjustment Board, could be brought before the courts after the end of the two-year period of limitations.

Summarizing the foregoing, therefore, it is our conclusion that the expiration of the two-year period specified in Section 3 First (q) terminates the rights of the parties to obtain a judicial determination of the "dispute" which was decided by the award. Under certain circumstances, however, and depending upon the answer given by the court to the First Question, it may be possible for one or the other of the parties to secure such a determination upon a new dispute, arising out of the same disagreement as to the interpretation of the contract which caused the original dispute.

Is Present Case Moot? The present case, of course, was filed during the two-year period, but comes before this court after the expiration of that period. The question, therefore, arises as to whether the case has become moot. The classical statement of the principles which govern the decision of this question is to be found in the opinion rendered by this court in the case of *Mills vs. Green,* 159 U. S. 651, where the court said:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which

cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

The petitioner, in its pleadings filed in the District Court, endeavored to establish the existence of an actual case or controversy by alleging that certain claims had been filed against it or would be filed, based upon the award of the Adjustment Board. As we have shown above, no claim predicated upon that award can now be asserted against the petitioner for the reason that the award itself has ceased to exist as a basis of liability. Hence, it might be argued with some force that the very claims upon which the action is predicated can no longer endanger the petitioner, and that the case has become moot.

We do not understand, however, that the law relating to moot controversies is so technically limited. This court in several cases has passed upon questions of law on appeal even though the particular fact situation originally imperiling the plaintiff had ceased to exist. Such decisions have been rendered in cases where there has been great public interest in the result, and where exactly similar situations presenting the same legal questions were likely to arise again in the immediate future.

The case of *Leonard vs. Earle*, 279 U. S. 392, was a mandamus action wherein the plaintiff endeavored to compel the issuance of a license to do business without meeting all of the statutory requirements. The requirements not met were asserted to be unconstitutional. The period which would have been covered by the license applied for had expired before the case reached the Supreme Court. The

plaintiff, however, intended to continue in this same line of business and would have required successive licenses for each succeeding year. This court said, in the course of its opinion:

> "Considering the nature of the controversy and the agreement between the parties touching appellants' purpose to continue in the packing business, it cannot be said that the cause has become moot."

In the *Leonard* case, the court cited several other cases in support of its decision, among them that of *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S. 498, which involved the validity of a cease and desist order of the Commission, which, however, had expired according to its terms before the Supreme Court considered the case. (The effective period of the order was two years.) The court held that there was a substantial public interest involved in the case and recognized further that if the action were held to be moot, it would be possible for the Commission, by issuing successive short term orders, to prevent any effective review. It was accordingly decided that the case was not moot.

This case presents substantially the same situation as those cited. The contract out of which the controversy originally developed is still in existence. Petitioner obviously intends to continue business and does not indicate that it intends to make any different application of the contract in the future than it has in the past. Accordingly, further challenges of its action may arise which may in turn be submitted to the Adjustment Board and further awards may be issued. If so, exactly the same situation would be presented as that which is involved in this case. Furthermore, even if this development should not occur, other awards are constantly being issued by this Board in other disputes which present the same basic problems of review as those which are involved here. It is important

that these problems be settled. If this court is held to be foreclosed from considering this case by reason of the expiration of the two-year period, it is highly doubtful if a similar case could ever be presented here which could decide the issues raised. The processes of trial and successive appeals can seldom be completed within two years. Apparently the consequences of holding this action to be moot would be to deny permanently to these very important questions opportunity of decision in this court.

It is submitted, therefore, that the court should not consider the action as being moot, but should pass upon and decide the substantive issues which have been fully presented and argued by the parties.

Generally summarizing the discussion of the court's Third Question, our conclusions are that:

(1) No judicial determination may be secured by either party to a "dispute" (used in the statutory sense) which has been made the basis of an award by the Adjustment Board, after the two-year period of limitations has expired.

(2) It is possible that a new dispute, based on the same general disagreement between the parties as to the interpretation of their contract, but on new acts of the carrier committed since the expiration of the two-year period, might be made the basis of judicial proceedings, depending upon the decision of this court as to the applicability of the primary jurisdiction rule.

(3) Where an award has been made by the Adjustment Board, a suit filed within the two-year period seeking an independent judicial interpretation of the contract on which the award was based, does not become moot at the expiration of the two-year period.

Note—In light of the above discussion, we believe that our position will now be clear regarding the last phase of the Court's Fourth Question, as to the "final and binding"

effect of an award of the Adjustment Board after the two-year period has expired. An award in favor of a carrier becomes absolutely final at the end of this period because if it is subject to challenge by the employees at all, the opportunity to make such a challenge is terminated.

An award against a carrier loses its legal effect at the end of two years and hence loses whatever degree of finality the statute gives it. The termination of the period of limitation, however, invests it with a sort of reverse finality because thereafter neither it nor any claim of right recognized by it may be enforced by judicial action.

SECOND QUESTION:

Whether the Board May Make an Award Ex Parte if One Party to the Dispute Does Not Appear Before the Board, and if so, the Effect Given by the Statute to Such an Award.

If the National Railroad Adjustment Board can make no awards against a party unless he appears before it, the opportunity is given to defeat the provisions of the statute at will by failing to enter an appearance in any pending case. We know of no precedent for a proposition to the effect that any party otherwise subject to the jurisdiction of an administrative agency may defeat that jurisdiction merely by absenting himself from its hearings. Accordingly, it is our position that the National Railroad Adjustment Board may make an award if one party to the dispute does not appear before it.

The statute draws no distinction between an award made against a carrier as a result of proceedings in which it participated voluntarily and an *ex parte* award, and we believe that none was intended. If any lesser effect were to be attached to an award made *ex parte*, a premium would be placed upon a failure to participate in the administra-

tive proceeding, which, to the extent of such premium, would nullify the intent of the statute for the same reasons as stated in the last preceding paragraph. It would certainly not be consistent with public policy to permit any party to lessen the effect of an administrative ruling by refusing to participate in a procedure established by law.

Insofar as the employees are concerned, there may be some difference in the degree of finality of the award, and hence in the right to, and scope of judicial review, depending upon whether the employees have elected to invoke the services of the Board (assuming that they have a right to make such an election). This matter has been considered in the course of the discussion of the Court's Fourth Question above, and will not be reconsidered here. If, however, a dispute is before the Board on the petition of the carrier, we do not believe that the effect of any award made would be governed by the fact that the employees did or did not participate in the hearing held.

While the above discussion might serve as a categorical answer to the Court's Second Question, we realize that its import is somewhat deeper. The Court of Appeals for the District of Columbia, after concluding that to permit the carrier in this case to secure an extra-statutory review would nullify essential purposes of the Railway Labor Act, made the following additional statement:

> "The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore vs. Illinois Central R. R., supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act. When it chooses the latter, we think it is bound to follow it through to the conclusion prescribed by the statute. Such a choice is made, we think, not only when the carrier submits or joins in submitting the dispute to the Board, but when, under submission by an employee, it appears

before the Board and participates in a full hearing on the merits. Having done these things, had the chance of a favorable decision, and finally, when it has lost, been confronted only with an order not enforceable except by a suit which has not been brought, which it seeks in effect to forestall by this one, and in which, if begun, it would have had a full day in court, plaintiff cannot complain that it has not had complete opportunity to protect its rights or that they have not been protected adequately." (R. 345.)

While the court thus draws support for its decision from the fact that the carrier participated actively in the proceeding before the Board, it obviously employs this argument as reinforcing a conclusion already reached. The paragraph quoted is in the nature of an "aside."

The carrier now contends that its appearance before the Adjustment Board should not be construed as in any sense voluntary or as constituting an election of a statutory administrative procedure in preference to judicial procedure which might have been considered by it as available. With this contention, we are disposed to agree. Where a party must defend or take the risk of having a decision issued against him on presentation by the other side, we see no basis for presuming that he has made an election.

As above noted, however, the language quoted from the court's opinion was not necessary to the court's decision, and even if considered to be erroneous, would not justify reversal.

CONCLUDING STATEMENT

We have discussed above the four questions propounded by the court from every point of view which has suggested itself to us. While many of the matters considered have no immediate relevancy to the specific issues of this case, they are significant in that they provide a background against which those issues may be viewed in proper perspective.

The conclusions reached present a balanced and equitable pattern of review for the awards and orders of the Adjustment Board. Reduced to summary in outline form, the pattern is as follows:

I. Review Available to Employees—As to awards issued against them or awards in their favor which do not grant all of the relief to which they consider themselves entitled.

A. *Awards secured at the petition of employees.*

1. *If the primary jurisdiction rule does not apply*—The statute provides no method of review in such cases and all constitutional requirements are met by the fact that employees have an option to proceed through either administrative or judicial channels. By electing the former, they waive their right to judicial determination of the controversy.

2. *If the primary jurisdiction rule applies*—No method of review is provided by statute but one is probably required by the Constitution and could be secured through any form of appropriate action, limited, however, to the issues permitted under the doctrine of administrative finality.

B. *Awards secured on petition of a carrier*—Whether the primary jurisdiction rule applies or not, there has been no election here by the employees to submit themselves to administrative procedure, and hence no waiver of a right to judicial determination. Judicial review is therefore probably available as a matter of constitutional right, its scope, however, limited by the considerations of administrative finality.

II. Review Available to Carriers—As to awards issued against them.

A. *Awards secured on petition of employees*—Regardless of whether the primary jurisdiction rule applies, there has been no election by the carrier to submit to the administrative agency and no waiver of the right of judicial determination. Review is available as a matter of constitutional right. Such review is provided for in the course of enforcement procedure which is a necessary prerequisite to the imposition of legally enforceable obligations upon the carriers. This procedure, being adequate to protect all legal rights of the carriers, is an exclusive one. Carriers are made subject to all of the limitations of that procedure set up in the statute and in addition, awards of the Board should be considered as possessing administrative finality.

B. *Awards secured on petition of a carrier.*

1. *If the primary jurisdiction rule applies*—The carrier, having no right of election, has a constitutional right of review which is accorded it under the statute, as indicated in II A above.

2. *If the primary jurisdiction rule does not apply*—The carrier in this situation would have no *constitutional* right to review because of the fact that it had elected to pursue the administrative channel. A right to review, however, is granted in Section 3 First (p) of the statute, the scope of such review being the same as that indicated under II A above.

Note 1: While the existence of a right of election may determine the right of the electing party to secure a judicial review of an award, such an election is not made by an appearance before the

Board in a proceeding instituted by the other party. The effect of an award made *ex parte* is no different from that of any other award.

Note 2: The expiration of the two-year period of limitation provided in Section 3 First (q) terminates all opportunity which an award may have to ripen into an enforceable obligation against a carrier. It also terminates any right which the employees may have to attack it. Thus, all right to review at the suit of either party is ended. No judicial determination may be secured by suit filed thereafter as to the "dispute" which the award decided. There may, however, be a right to seek a judicial determination of the disagreement between the parties if a new dispute develops therefrom after the expiration of the statutory period.

In our earlier brief, the more restricted consideration given to this case led us to the conclusion that the only method of review available to a carrier as a means of testing the validity of a decision of the Adjustment Board is to await suit on the order according to the statutory procedure. This conclusion was based in the first place on the general legal principle that where an administrative order cannot become legally obligatory without judicial proceedings in which it may be reviewed, such method of review is adequate to protect the rights of the parties and further, that where the statute provides an adequate method of review for administrative orders, such method is held to be exclusive; and in the second place, our conclusion was based on a consideration of the language and purposes of the Railway Labor Act, in connection with which we pointed out that an extra-statutory review at the suit of a carrier would serve to impair or destroy the legal effect of the

awards of the Adjustment Board under Section 3 First (p) and would, to that extent, nullify the statute. These conclusions are in no way contradicted by those reached in this brief.

As already pointed out above, if the court should now decide that the administrative procedure of the National Railroad Adjustment Board is an exclusive one which, by its existence, precludes primary resort to the courts as a means of securing interpretations of collective bargaining agreements between carriers and employees, an added reason is provided for concluding that the prescribed statutory method for reviewing awards against carriers is likewise exclusive.

The fact that decisions of the Board are made "final and binding" by the statute is evidence of an intent that they may not be disregarded or by-passed by carriers through the device of filing a non-statutory action which would have the effect of re-examining all issues passed upon by the Board, thus robbing the awards of the finality imputed to them. We have pointed out that there may be some differences of opinion as to the degree of finality of such awards. They may be considered absolutely final against employees who elected to pursue the administrative remedy available. They may be considered as having administrative finality only, supplemented by the effects conferred upon them by statute in Section 3 First (p). Whatever the conclusion reached, the purposes of the statute may be fully realized only by restricting the review of awards against a carrier to that established by the Railway Labor Act.

The fact that the award in this case was rendered after a hearing in which the carrier participated neither strengthens nor weakens the conclusion that the statutory method of review is exclusive. While the lower court mentioned the carrier's participation in the proceeding as a factor supporting its decision, the main current of reason-

ing of the opinion leads to the same result, regardless of this fact.

The conclusion reached above to the effect that the employees' rights to enforce or attack an award of the Board and their rights in connection with the "dispute" terminate with the end of the comparatively short period of two years, affords an equitable counterbalance to the principal conclusion that carriers may not during that period seek a non-statutory review through any suit wherein they might act as plaintiffs.

In conclusion, it is submitted, therefore, that under whatever basic theory we proceed, the same result is reached, *i.e.*, that an award against a carrier may be fully reviewed in the course of the statutory proceeding provided for its enforcement; that such method of review is constitutionally adequate to protect the legal rights of carriers, and that it is exclusive. Any other conclusion would deprive the awards of the Board of the effect which the statute contemplates. It is submitted, therefore, that this action was improperly brought, and that the judgment of the lower courts should be sustained.

Respectfully submitted,

MULHOLLAND, ROBIE & MCEWEN,
Attorneys for Respondents.

By WILLARD H. MCEWEN,
Of Counsel.

APPENDIX

EXCERPTS FROM "HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, 73d Congress, 2d Session, on H. R. 7650." Pages 58 to 64, Inc.

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Mr. Pettengill. Mr. Eastman, at the bottom of page 17, it says that the award shall be final and binding upon both parties to the dispute, excepting insofar as they shall contain a money award.

Is it your interpretation that that language, by implication or argument, would make a strike unlawful?

Commissioner Eastman. That is the same language which, as I recall it, is in the present act with reference to decisions of boards of adjustment on grievances. The present act also provides that if the parties agree to arbitration of a major issue, then the decision of the board of arbitration shall be final and conclusive.

Now, the only difference here is that there is provision for preventing deadlocks on an adjustment board by the appointment of a neutral member.

Mr. Pettengill. And, this act does not make a matter of agreeing to arbitrate a matter of discretion? It makes it a matter of duty on the part of the parties to this dispute.

Commissioner Eastman. Yes; and it is my understanding that the employees in the case of these minor grievances—and that is all that can be dealt with by the adjustment board—are entirely agreeable to those provisions of the law.

I think that is a very important concession on their part. It does not go to the major issues with reference to wages and working rules; but to all disputes except working rules and wages.

Mr. Pettengill. Well, does it not apparently make binding the award on all matters except insofar as they pertain to wages?

Commissioner Eastman. The only jurisdiction that the adjustment board has is over these minor grievances.

Page 58 Mr. Pettengill. Well, I know that we all indulge the hope that matters as important to the public as uninterrupted train service shall not be interrupted if possible, and that means shall be provided so that those strikes may not happen; but I am not prepared to go far as to say that labor shall, by law, be required to abandon that ancient weapon which has been recognized by the United States Supreme Court over and over again.

Mr. Wolverton. Is that not provided for in the proviso to section 2 reading:

> *Provided*, That nothing in this act shall be construed to require an individual employee to render labor or service without this consent, nor shall anything in this act, be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

It would seem as though this provision would cover the thought you have in mind.

Mr. Pettengill. Well, when he has joined an organization and has selected a representative and the representative has submitted an award, then he has consented to it, has he not?

Mr. Wolverton. Theoretically I would say yes; but I understood you to go beyond that in making your inquiry.

Page 59 Mr. Eastman yesterday seemed to be of the opinion that there is nothing in this bill that calls for compulsory arbitration or that could be taken to enforce a decree against a labor union. They would still have the right to strike.

Mr. Pettengill. That is the question that I am raising. I do not want to take the time this morning.

Mr. Merritt. Any consent under this bill must be subject to that provision; that is, concerned with the proviso on page 10.

Mr. Wolverton. I have merely expressed the impression I received from the statement made by Mr. Eastman yesterday. I may be wrong in that.

Commissioner Eastman. Well, I was talking yesterday about a dispute which arises as to who is the representative of a particular group of employees.

Mr. Wolverton. Yes. Page 59

Commissioner Eastman. Now, that is the provision in paragraph 9 in section 2.

Mr. Wolverton. Yes.

Commissioner Eastman. In my answer to you I said there was nothing in the act which provided for the enforcement of those particular decisions. That answer would not apply to decisions of the adjustment board, and they are made final and binding by the terms of this act, and as I understand it, the labor organizations, none of them, are objecting to that provision. They have their day in court and they have their members on the adjustment board, and if an agreement cannot be reached between the parties representing both sides on the adjustment board, a neutral man steps in and renders the decision, and they will be required to accept that decision when made, with respect to these minor matters. They are not the major issues which arise in the labor world. It has to do with the settlement of these grievances. Page 16 defines the disputes which are to be referred.

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.

Now, the proviso on page 10 protects the individual who wants to walk out but it does not cover collective action in walking out.

Mr. Pettengill. Your interpretation there, Mr. Commissioner, would be that under the language at the bottom of page 17, although the individual may be free to walk out, the organization would not be free to call a strike after an award had been made on these matters that are covered by the language at the bottom of page 17.

Commissioner Eastman. Well, that is my understanding; yes, sir.

Mr. Cooper. Mr. Pettengill, what would be the use of having these boards if both parties do not abide by their decisions?

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Mr. Pettengill. I am not arguing the point, Mr. Cooper. I am just asking for the interpretation of the Commissioner of his understanding of the law, and if it is his interpretation that it does make a strike illegal.

Mr. Cooper. I cannot see the sense of going ahead and setting up boards and have the carriers and employees go before these boards, if they do not agree to abide by the decision of the board and the neutral member that may be brought in.

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Mr. Lea. Under that proviso, in the tenth subdivision, do you take it that that draws a distinction between an individual quitting his employment and the employees agreeing collectively to quit?

Commissioner Eastman. Yes, sir. As I recall that, in the original form it was in, it had something about collective action and it was changed to this language which is the language in the present railway labor act. It is the same proviso as is in the law now.

Mr. Lea. The emergency act made collective action the same, or put it on the same basis as individual action, did it not? It placed collective action on the same basis as individual action in quitting employment.

Commissioner Eastman. I do not recall that there was anything in it. Well, there was something in the emergency act about that; yes, sir. The proviso in the emergency act is:

> *Provided*, That nothing in this title shall be construed to require any employee or officer or any carrier to render labor or service without his consent, or to authorize the issuance of any orders requiring such service, or to make illegal the failure or refusal of any employee individually, or any number of employees collectively, to render labor or services.

Now, of course, they were not dealing in this with the settlement of disputes between the carriers and the employees. The question was whether the Coordinator could order certain employees to keep on working.

Mr. Cooper. Mr. Chairman, may I ask the Commissioner just one more question, because I want to get this thing very clear?

The Chairman. Yes.

Mr. Cooper. Do I understand this paragraph then on page 17, in which it says, "the awards shall be final and binding upon both parties to disputes," would that prevent a railroad employee or an organization from striking, if they saw fit? Would it be a violation of the law if they did that? Page 60

Mr. Pettengill. Could an injunction issue to prevent them from doing it?

Commissioner Eastman. I cannot tell you what the legal procedures would be in enforcing the award, where it is against the employee. Paragraph (p) covers the case where a carrier does not comply with the order of the adjustment board.

Mr. Cooper. Would it apply to either carrier and/or employees? Now, if we go that far are we not writing something new into the law of the land to deprive the employees of rights which they already had?

Commissioner Eastman. Well, as I say, you have exactly similar provisions in the present labor act with respect to decisions by adjustment boards and where they agree to arbitration, and this law is in effect an agreement on the part of the parties to arbitrate all of these minor disputes.

The Chairman. Was that not one of the reasons, to try to keep down strikes to get people together?

Commissioner Eastman. Yes. It is a very important part of it. The willingness of the employees to agree to a provision of that sort seemed to me to be a very important and praiseworthy thing.

Mr. Cooper. Well, I fully approve of that method, Mr. Commissioner, and I say that if they are going into these boards and are willing to go in there, why probably they ought to abide by the finding of the board; but I do not know whether I would want to go so far as to say that if they do not agree to it that it would be a violation of law. Page 61

Mr. Wolverton. Does this act in any way, Mr. Eastman, provide that it will be a violation of law if they do not comply with the decree and the order that is made?

Commissioner Eastman. It says that the award shall be final and binding.

Mr. Wolverton. Does this bill attempt in any way to

Page 61 enforce that provision; and if so, is it contrary to public policy to put such a provision in the bill?

Commissioner Eastman. Page 19, line 19, it says:

> The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the adjustment board.

Mr. Wolverton. Is there any provision in this bill that would enable the court to obtain an injunction against a labor organization which is dissatisfied with the final decree and refuses to comply with it?

Commissioner Eastman. Well, I am not able to give you an answer to that. That is a legal question, to be frank with you, that I have not gone into.

Mr. Wolverton. It would seem to me that the provisions or language of the bill itself would answer that question. And is it contrary to public policy to have such a provision in there?

Commissioner Eastman. Well, it is my own opinion that there ought not to be strikes with reference to minor grievances of that sort. I should be very unwilling to take away from the employees the right to strike on major issues, but these are not major issues.

Mr. Wolverton. The provision which I read a few moments ago protects the individual employee so that no court can order him to work, and no court can issue an injunction preventing him from striking nor in any way prevent the free exercise of his own individual discretion as to whether he shall work or not work.

Is there any language that is equally clear with respect to the organizations? I understand you are not certain that the language would apply to any other than an individual.

Commissioner Eastman. Well, I think that the carrier can enforce the order. For instance, if the order provides that certain working rules shall be interpreted in the same way, the carrier, of course, can apply the rule in that way.

Now, the only question I am in doubt about is whether or not there should be an injunction under this act to prevent a strike. Now, I am not clear about that.

Mr. Wolverton. Do you think that there should be such a provision in the bill? Page 61

Commissioner Eastman. I would rather see it carried out without that, because I do not believe you are going to have that question arise.

Mr. Wolverton. Do you consider it better policy to leave it out—

Commissioner Eastman. Well, no particular question has been raised about this matter of enforcement.

Mr. Wolverton. Let us first have a frank understanding as to whether it is included or is not included in the bill and then we can determine the policy as to whether it should be or should not be in the bill; but it certainly seems to me that the bill ought not to be left indefinite either from the standpoint of the carriers or the standpoint of the employees. We should know just what the situation is. Page 62

Commissioner Eastman. I think I would prefer that my legal adviser, Mr. Carmalt, who has been working on this bill for me, be asked that question. If you will ask him what he thinks about that.

Mr. Carmalt. It seems to me at least arguable that a strike might be enjoined under the provisions of this law, that is to say, a strike called because of failure to comply with an adverse decision of the judgment of the Board in favor of the carriers against the employees.

Mr. Wolverton. How would an injunction of that kind be directed—to the officers of the organization or the membership?

Mr. Carmalt. To the employees, I take it.

Mr. Pettengill. Well, may I ask a question?

The Chairman. Yes, Mr. Pettengill.

Mr. Pettengill. You say that you take it that it is arguable that an injunction might issue to enforce the award, and would not that injunction then be binding upon every individual if a member of an organization that had participated in the hearing?

Mr. Carmalt. Well, Mr. Pettengill—

Mr. Pettengill. What is the use of an injunction directed against some names, unless it includes the members of the organization and would not make nugatory the ex-

Page 62 emptions at the bottom of page 10, which attempts to protect the individual?

Mr. Carmalt. That clearly means individuals in case of the grievances, and the injunctions, I should take it, would run against the individuals who were the claimants.

Mr. Cooper. Well, in that respect, Mr. Pettengill, there may be 10,000 individuals involved in the particular controversy.

Mr. Pettengill. That is correct.

Mr. Cooper. So it seems to me that an injunction would apply to all of those connected with that part of the railroad work which was being arbitrated.

Mr. Wolverton. Was it the purpose in this act to confer the right to enjoin an organization from disputing a decision made by the Board?

Mr. Carmalt. The original House bill on this question was drawn by the employees and the language was, I think, brought directly over in the same form that the employees presented it.

The question has not arisen therefore, before this morning, and I am more or less thinking out loud in connection with it, because of that fact, but it has seemed to me that the implication lay, from the form of the bill, that a strike on account of these minor grievances would not be permitted and might be enjoined.

Now, as to against whom the process should run, I have not thought it through; but presumably it would run against anybody that was endeavoring to make nugatory the findings of the Board.

Mr. Wolverton. There is no doubt in your mind that the provisions of the bill are broad enough to take any kind of action against a carrier to compel, either by injunction or mandamus, its compliance with an order that has been made; is that right?

Page 63 Mr. Carmalt. That is right.

Mr. Wolverton. Now, does the same power exist with respect to the other parties? Has this question been left open purposely, or has it been overlooked, or what has been the policy in the drawing of the bill?

Mr. Carmalt. No. It was felt there were individual grievances involved, that the carrier had the power in its

hands to enforce the awards of the Board as against the individual; that is, the individual judgments that are rendered by the Board.

Now, the question of strikes had not arisen in connection with it until this morning.

Mr. Wolverton. Is it your opinion that there should be such a provision in the bill or not?

Mr. Carmalt. I hesitate to talk, effecting a policy in that regard—

Mr. Wolverton. I am only asking you to express your opinion.

Mr. Carmalt. My opinion is that there should not be right to strike over grievances of this kind where the Government has provided the machinery whereby the grievances may be considered by an impartial board.

Mr. Wolverton. Do you think that the language that has been referred to by Mr. Eastman, as conferring this absolution, so to speak, so far as an employee is concerned, would provide equal protection to the organization itself?

Mr. Carmalt. No; I think this injunction would run rather as against a strike. There is no other means of resisting the order. But, as to an individual quitting, I think the absolution would be effective.

Mr. Wolverton. Do you think that the absolution that has been given the employee should likewise be given to the organization?

Mr. Carmalt. Oh, no.

Mr. Wolverton. What?

Mr. Carmalt. No.

Mr. Wolverton. What did you say?

Mr. Carmalt. No. The employees, in their drafting of the bill, put that absolution in, and in redrafting the bill we took the language of the present act which would not give that absolution to the organization.

Mr. Wolverton. So then you assume that under the provisions of this bill an injunction could issue to prevent an organization from going on strike?

Mr. Carmalt. Such an injunctive process as might be necessary to prevent the strike growing out of the settlement of grievances under section 3, I should believe would lie.

Page 63 Mr. Wolverton. Then the bill has been drawn purposely so that it would have that effect, so far as the organization is concerned but not so far as the individual is concerned?

Mr. Carmalt. I would not say that it gives any authority in that regard, because it was assumed that would be true, I think, but there has been no discussion of it until this morning. .

Commissioner Eastman. I may say, so far as I am concerned, it had not seemed to me that matter was a contingency of importance, because I cannot conceive of organizations striking over the settlement of grievances, particularly when they had been passed upon by an impartial tribunal under Government auspices.

Page 64 It is a serious enough thing to strike when a major matter is involved; but when you have only minor grievances and they have had full opportunity to be heard and have had their day in court before a tribunal, it hardly seemed to me that that was a question that was likely to arise. My own idea would be, let that question arise out of experience and find out whether there is actual need for any such power before you provide for issuing injunctions for preventing strikes.

Mr. Wolverton. Mr. Commissioner, that may be true. Maybe that is a proper course to pursue, but what I am seeking to find out is whether this language declares something else to be the policy.

Commissioner Eastman. Yes.

Mr. Wolverton. And, I am endeavoring to find out just what the language of this bill does provide, so that we may know what policy we are adopting. It may be that a hands-off policy is what we should adopt, but in that case, I do not want to see something in the bill that carries a different effect. That is the purpose of my questions, in trying to find out definitely what is the purpose or effect of the provisions in this bill.

Commissioner Eastman. I shall be glad to give the matter study and let you know just what my opinion is upon it.

Mr. Cooper. Mr. Chairman—

The Chairman. Mr. Cooper.

Mr. Cooper. Mr. Commissioner, I cannot just agree that all of these disputes outside of the salary questions are minor. You may have some very big question come up that does not affect the salary at all. Page 64

Commissioner Eastman. I am not saying that salary is the only question.

Mr. Cooper. Or, the question of wages. But, that was referred to. Strikes might be called over a minor dispute. Well, I would not like to see that. But, there may be some big questions that they are concerned about and I am concerned about this, to know whether we are writing into law, for the first time in the history of this country, into this bill, a provision which would make it unlawful for a labor organization or a group of laboring men to leave their employment if they desire to do so.

Commissioner Eastman. Mr. Cooper, do not make any mistake about this: You have referred to wages. The whole matter of working rules and conditions is not within the jurisdiction of this adjustment board. They have no right to determine what the working rules shall be. It is only the interpretation of whatever rules are agreed upon. It is a question of interpreting them. It is minor matters of that kind, and not the questions either of wages or of working rules. The basic matters are left for the processes of mediation.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 28

THE WASHINGTON TERMINAL COMPANY, PETITIONER

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 124 F. (2d) 235, and is printed in the record at R. 331–381. The district court rendered no opinion.

STATUTE INVOLVED

The statute primarily involved is the Railway Labor Act as amended June 21, 1934 (c. 691, 48 Stat. 1185, 45 U. S. C., Secs. 151–163), and particularly Section 3 thereof, which creates and defines the powers of the National Railroad Adjustment Board. The entire Act is printed at

pp. 74–87 of the Appendix to a compilation of material on the Adjustment Board entitled "Inquiry of the Attorney General's Committee on Administrative Procedure relating to the National Railroad Adjustment Board, and Historical Background and Growth of Machinery Set Up for the Handling of Railroad Labor Disputes, 1888–1940" (hereinafter referred to as *Compilation*) copies of which have been distributed to the Court.[1]

The most important provisions are paragraphs (i), (j), (m), (o), (p), and (q) of Section 3, First of the Act. These paragraphs read as follows:

> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval

[1] This volume is a compilation of most of the pertinent documentary material relating to the National Railroad Adjustment Board. It contains in full the reports of and proceedings before the Attorney General's Committee on Administrative Procedure dealing with the Adjustment Board, and reprints the executive orders, collective labor agreements, and statutes disclosing the history of the Adjustment Board and also the leading speeches and articles describing its operation. This publication was compiled by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, New York City. Most of the documents hereinafter referred to are printed in the Appendix to the volume (the *pink* pages).

of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award in-

cludes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at

law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

STATEMENT AND QUESTIONS PRESENTED

Respondents, employees of petitioner, were engaged in a dispute with petitioner as to the interpretation to be given the seniority provisions of the collective agreement governing the work performed by the respondents. After the parties had failed to settle the dispute themselves, respondents submitted their claims to the First Division of the National Railroad Adjustment Board, which, on October 24, 1938, ruled in respondents' favor (R. 9–10). On December 29, 1938, petitioner filed this suit for a declaratory judgment, praying that the agreement be interpreted in accordance with petitioner's original contentions and that the award and order of the Adjustment Board be declared "invalid and of no legal force and effect" (R. 13–14).

The District Court dismissed the complaint, holding that there was no actual controversy between the parties, and that there was a specific

remedy provided by statute for this type of case (R. 326, 55). The Court of Appeals for the District of Columbia affirmed, on the ground that at least during the first two years after the Adjustment Board's award the procedure prescribed in Section 3, First (p) of the Railway Labor Act was exclusive (R. 331–381). Before the entry of the opinion of the Court of Appeals, the two-year period expired. This Court granted certiorari (R. 383).

After argument by the parties, this Court entered the following order:

> This cause is restored to the docket for reargument. On the reargument counsel are requested to include in their briefs and oral argument a discussion of the following questions:
>
> 1. Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts, either before or after submission of the dispute to the Board;
>
> 2. Whether the Board may make an award ex parte if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award;
>
> 3. The effect of the expiration of the two-year period specified by Section 3 First (q) upon the right of either party to the dispute to obtain a determination of it in the courts;

4. The effect of the words "final and conclusive" in Section 3 First (m) upon the right to resort to the courts and upon the scope of judicial review, (a) during the two-year period, and (b) after expiration of the two-year period.

The Solicitor General is requested to file a brief, and, if he so desires, to participate in the oral argument.

This brief is filed pursuant to the above request. It will discuss the four questions listed in the Court's order.

SUMMARY OF CONCLUSIONS

1. A party is not precluded by the adjustment provisions of the Railway Labor Act from resorting to the courts instead of submitting a dispute to the Adjustment Board. Once the machinery of the Act has been invoked, however, extra-statutory legal proceedings are no longer available to the parties.

2. The Board may make an award although one party does not appear, and such an award has the same effect as any other.

3. The expiration of the two-year period specified in Section 3, First (q) for seeking enforcement of orders of the Adjustment Board does not enlarge the right of either party to resort to the courts.

4. The provision in Section 3, First (m) that non-money awards shall be "final and binding" is an indication that Congress intended such awards

to be treated as conclusive except as otherwise specified in the Act or required by the Constitution. This would mean that where the statutory remedies are legally adequate, no other proceedings can be brought, and that in any extra-statutory suits which might be brought, the Board's awards would be judicially reviewable to the minimum extent required by the Constitution. In proceedings under Section 3, First (p), the Board's awards would be *prima facie* evidence of the facts stated.

These conclusions are based upon what we conceive to have been the intention of the Congress which passed the Act in 1934. That Congress, we believe, assumed that paragraph (p) would not only provide the carrier with an adequate remedy in theory, but also that the paragraph would be used by the employees. The latter has not been the fact. Nevertheless, despite the effect of the employees' unforeseen refusal to avail themselves of the remedy upon its practical adequacy, we do not feel free to urge that, because of the manner in which the Act has operated, it should be construed in a way not intended by the Congress.

ARGUMENT

INTRODUCTION

The issues presented by this case arise because of the effort of Congress to strengthen a bipartisan system of adjustment, dependent for its

existence and force upon the agreement of the parties, by changing it into a compulsory system finding its roots in mandatory statutory provisions. Labor and management differ as to whether this transformation affected the basic nature of the system and the manner in which it was designed to operate. A consequence of their conflicting positions has been to impair the effective functioning of at least the First Division of the National Railroad Adjustment Board.

The difficult questions which now confront the Court result, in part, from the failure of Congress to recognize or be aware of the possible implications of this change. This is reflected in the novel and, in so far as involved here, apparently internally inconsistent language of the Act. In these circumstances, and in the absence of an express declaration of any sort, legislative intention is difficult to ascertain.

THE FIRST QUESTION

WHETHER EITHER PARTY TO A DISPUTE OVER WHICH THE ADJUSTMENT BOARD HAS AUTHORITY IS PRECLUDED FROM SEEKING A DETERMINATION OF THE DISPUTE BY THE COURTS, EITHER BEFORE OR AFTER SUBMISSION OF THE DISPUTE TO THE BOARD

The primary issue presented in this case is whether a carrier may bring an action for a declaratory judgment seeking an interpretation of a railway labor agreement after the same question has been presented to, and decided by, the National Railroad Adjustment Board. The Court has also requested discussion of the separate but related

question as to whether the Adjustment Board's jurisdiction is exclusive in the first instance.

No provision of the Railway Labor Act expressly answers either of the questions. Nor is there definite manifestation of congressional intention in the immediate legislative history of the Act. We are thus faced with the task of seeking the meaning of the Act in relation to a problem which probably did not occur to the legislative body and with respect to which it appears to have had no "consciousness of intention" whatsoever. *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 389. The problem must be resolved in the light of the purposes of the statute, and particularly of the provisions relating to the Adjustment Board. An examination of the historical background of those provisions should aid in determining the construction most likely to achieve the statutory objectives.

A. THE HISTORICAL BACKGROUND [18]

1. *The Period Preceding the Present Act*

The present Board is the culmination of a long period of practice and experimentation in devising means of settling railway labor disputes. The first predecessor of the Adjustment Board was the

[18] The background and legislative history of the "final and binding" clause in Section 3, First (m) are set forth separately in our discussion of the Court's Fourth Question, *infra*, pp. 71–81. That material, which develops the relationship between adjustment under the Railway Labor Act and arbitration, also has a bearing upon the answer to the First Question.

"Commission of Eight" created on March 19, 1917, by agreement of the railroads and the four train-service Brotherhoods, to interpret an award of the Committee of the Council of National Defense settling the eight-hour day controversy.[2] This commission was composed of four representatives of the Brotherhoods and four of the carriers.[3]

Shortly after the Government took over the railroads during that war, the Director General of Railroads, by order, established Railway Board of Adjustment No. 1, which was in substance and form a continuation of the Commission of Eight for train service employees.[4] The order, which made effective a "memorandum of an understanding," previously reached between the Brotherhoods and the "directors for the railroads under government control," provided that "all controversies growing out of the interpretation or application of the provisions of the wage schedule or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the Government *shall* be dis-

---

[2] See *Compilation*, pp. 403–404, Appendix, pp. 18–19; Wolf, *The Railroad Labor Board*, pp. 50–57. The award was expressly made to become effective whether or not the Adamson Act was held constitutional. Although the settlement was obviously agreed upon before the decision of this Court in *Wilson* v. *New*, 243 U. S. 332, it was signed on March 19, 1917, the same day that the decision was rendered.

[3] *Compilation* and *Wolf, loc. cit. supra.*

[4] See *Wolf, supra*, pp. 50 *et seq.; Compilation*, Appendix, pp. 19–22.

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posed of in" [italics supplied] the manner described.[5] Deadlocked cases were referable to the Director General; "but practically every case" was amicably settled by a majority vote of the Board.[6] During succeeding months two similar boards were established for the shopcrafts and for other national labor organizations.[7]

This machinery was recognized as applicable only to the members of the major railway labor organizations signatory to the understanding.[8] By order of the Director General the cases of "employees not represented by Railway Boards of Adjustment" were to be handled by the individual or his representative in the same manner up to

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[5] The Board consisted of an equal number of representatives of the carriers and the labor organizations. Section 10 of the memorandum, in language similar to that in the present Act, provided that "Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes * * * covered by this understanding, will be handled in their usual manner by general committees of the employees up to and including the chief operating officer of the railroad (or someone officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer" then the matter shall be jointly submitted to the board of adjustment. In the proceedings before the Board the employees were to be represented by the person designated by the chief executive officer of the organization concerned. *Ibid.*

[6] See *ibid; Report of the Director General for the Fourteen Months Ending March 1, 1920*, p. 15.

[7] *Compilation*, Appendix, pp. 23–30; Wolf, *supra*.

[8] Wolf, *supra*, pp. 52–53.

the chief operating officer of the carrier, and then if not settled, submitted to the Division of Labor of the Railroad Administration.[9]

These orders became inoperative after the carriers were returned to private ownership. Railway labor relations were subsequently governed by Title III of the Transportation Act, 1920 (c. 91, 41 Stat. 456). Although it had been proposed that adjustment boards be made compulsory, Section 302 of the 1920 Act provided only that—

> Railroad Boards of Labor Adjustment *may* be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.[10] [Italics supplied.]

Such adjustment boards were to hear cases submitted by the carriers or labor organizations, or "upon the written petition signed by not less than 100 unorganized employees" (Section 303). If no adjustment board was established, or if an adjustment board failed to reach an agreement, the dispute was to be submitted to the Railroad Labor Board (Section 307).[11]

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[9] *Compilation*, Appendix, pp. 30–32.

[10] *Compilation*, Appendix, p. 33; Wolf, *supra*, pp. 91, 267.

[11] This Board was composed of three representatives of the public, three of management, and three of labor. Its functions are described in *Pennsylvania Railroad Company* v. *Railroad Labor Board*, 261 U. S. 72; *Pennsylvania Railroad System and Allied Lines Federation* v. *Pennsylvania Railroad Company*, 267 U. S. 203; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

Although the Act was passed in the belief that adjustment boards would be established, the carriers and the labor organizations were not able to agree upon whether national or system boards should be created.[12] Accordingly, no general scheme of adjustment boards was established. One result of this was that the Railroad Labor Board was swamped with a vast number of minor cases and was unable to devote adequate time to the larger issues with which it was expected primarily to deal.[13]

Three regional adjustment boards, however, were created, by agreement between the four train-service brotherhoods and many of the carriers. These agreements were substantially similar to those entered into during the War; they provided that disputes "shall be" disposed of in the manner provided. Unsettled cases were to be certified to the Railroad Labor Board.[14]

In 1926, after the break-down, for many reasons,[15] of the machinery established in Title III

[12] Wolf, *supra*, pp. 267–273. As in 1934, the employees sought a national board and the carriers system boards.

[13] *Ibid.*

[14] Wolf, *supra*, pp. 273–276; *Compilation*, Appendix, pp. 39–53. The agreements conformed to the statute in that after submission to the chief operating officer of the carrier, disputes could be filed with the Board either by the chief of the labor organization or by petition of 100 unorganized employees.

[15] See Wolf, *supra*, pp. 358 et seq.; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 563; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 542.

of the Transportation Act, the Railway Labor Act was enacted in its place (44 Stat. 577). Section 3 of this statute indicates an intention that the establishment of adjustment boards was mandatory; it provided that—

> * * * Boards of adjustment *shall* be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.[16] [Italics supplied.]
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> * * * * *

The section went on to state that disputes of the type here in question "shall be handled in the usual manner up to and including the chief operating officer of the carrier * * *; but, failing to reach an adjustment in this manner, that the dispute *shall be referred* to the designated adjustment board by the parties, or by either party * * *" [Italics supplied.] (Section 3, First (c)).

As might have been anticipated, the change from "may" to "shall" in the 1926 Act did not in itself succeed in bringing agreement between

[16] The labor organizations had previously supported the Howell-Barkley Bill which was favorably reported to the Senate in 1924, but which failed to pass. See Senate Report No. 779, 68th Cong., 1st Sess.; Wolf, *supra*, pp. 406–415. This bill provided for national adjustment boards. Presumably the substitution in the 1926 bill of the provision for the establishment of boards by agreement only was a concession to the carriers in order to get them to join with the labor organizations in submitting the latter bill to Congress.

carriers and employees as to the kind of adjustment board to be created. The carriers still insisted on system boards and the Brotherhoods on a national board.[17] The boards previously established for train service employees were continued, however, and a new board created for the southwestern region.[18] In addition, a number of

[17] The situation was picturesquely described by Chairman Winslow, of the Board of Mediation, before the Senate Committee on Interstate Commerce, at the Hearings on the 1934 amendments (Hearings on S. 3266, 73d Cong., 2d Sess., p. 137), as follows:

"The provision in the present act for adjustment boards is in practice about as near a fool provision as anything could possibly be. [Laughter.] I mean this—that on the face of it they shall, by agreement, do so and so. Well, you can do pretty nearly anything by agreement, but how can you get them to agree? No way has yet been found, where difficulties have come up. But the curious part is that they can work entirely within the provisions of law and never agree, so you never get an adjustment board. Side A, for instance, wants a system board. Side B wants a regional board, to illustrate. And they are both subscribing to that provision of law; they both want boards; they are brokenhearted to think that they can't get them [laughter], but they never will agree on the board. So what good is it? It is utterly impractical and absolutely a mess * * *."

[18] *Compilation*, p. 410, Appendix, pp. 57–61. The new train service agreement was substantially the same as the earlier ones, except that it omitted the provision required by the 1920 Act for submission of cases by unorganized employees (*Ibid.*). The older agreements were modified so as to make unsettled cases referable to the Board of Mediation instead of to the Railroad Labor Board, and so as to indicate that only organizations party to the agreement could submit cases to the Board (*Id.*, at 47, 49, 54, 56).

system boards were created for other classes of employees.

But in many instances the carriers and the employees were unable to reach agreement on whether or not to establish boards of adjustment. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 3. Moreover, the 1926 Act contained no machinery to deal with the cases in which the carrier and labor members of the Boards, who were equal in number, failed to agree. As a consequence, "Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked" (*Ibid.*). The Board of Mediation was flooded with these deadlocked cases, to be handled through mediation in addition to its other duties.[19] The result of the failure of the parties to agree to establish adjustment boards, or of the members of such boards to reach decisions was that "unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment" (*Ibid.*).

[19] See the testimony of Chairman Winslow at the Hearings before the House Committee on Interstate and Foreign Commerce on Railway Labor Act amendments (H. R. 7650), 73d Cong., 2d Sess., p. 72 (hereinafter referred to as "House Hearings"). In 1934 the name of the Board of Mediation, created by the 1926 Railway Labor Act, was changed to "National Mediation Board."

There was substantial agreement as to the need for correcting these conditions. Federal Coordinator of Transportation Eastman, who submitted and explained the bill which became the 1934 Act to the congressional committees, summed up the views of the carriers and the employees on this question as follows (Hearings before Senate Committee on Interstate Commerce, to amend the Railway Labor Act (S. 3266), 73d Cong., 2d Sess., pp. 152–153, hereinafter referred to as "Senate Hearings"):

> * * * Apparently it is agreed by all that the provision in the present act for boards of adjustment has been ineffective; (1) because the establishment of such boards has not been compulsory, and (2) because there has been no way to prevent deadlocks in those which have been set up. The employees want a National Board of Adjustment, divided into four sections, to be created definitely and certainly; and the railroads, as I understand them, are willing to have 16 regional boards of adjustment set up. Both parties are willing to permit system or other local boards of adjustment to be set up by agreement, so long as the arrangement is otherwise within the terms of the act. Both are willing to have neutral members appointed, and by the Mediation Board if necessary, in order to prevent deadlocks.

The Coordinator favored the establishment of a national board, although he conceded that the

plan was experimental, that there was something to the carriers' objection that such a board might "bog down with a multitude of docketed but undecided cases" (*id.*, at p. 18), that the plan depended for its success "very largely upon the wisdom with which it is administered, both by the actual members of the board and also by the parties which stand behind them, namely, the carriers and the labor organizations," (*ibid*) and that either side could "make the experiment fail" (*id.*, at p. 19).

Mr. Eastman advanced as one of the advantages of a national board, as contrasted with regional boards, the desirability of "a more uniform settlement of these disputes"; this he felt would ultimately "tend to reduce very materially the number of disputes which could not be settled locally" (*id.* at 154, 155). In this connection he stated:

> I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally. As a matter of fact the same rules are now interpreted in many different ways throughout the country, and that is one reason why grievances which arise remain unsettled, because there is disagreement as to what the same language means and a great variety of interpretations. If we had one board, nation-wide, setting precedents in these matters, I think the tendency would

> be to establish guides which would enable a great many of the issues to be settled at home.[20] * * *
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> Furthermore, I have the feeling that it is very desirable to have a more uniform settlement of these disputes. These matters that we are now dealing with are grievances. They are not the basic rates of pay or the basic working rules and the interpretation of those rules or grievances which men have, and it doesn't seem to me that it is necessary to have any number of different ways of disposing of those all over the country, and that the national board could soon set certain precedents which would discourage and limit the number of such disputes which would arise, because it would be perfectly clear what the outcome would be if they were preferred to the national board.[21]

Uniformity in applying railway labor agreements is, of course, more likely to be achieved if all disputes must first go to a national board rather than to the numerous state and federal courts. Thus, although Mr. Eastman was speaking only of the advantages of national over regional adjustment boards, his remarks are also pertinent here.

As a result of opposition on the part of the carriers to a national adjustment board, two new

[20] House Hearings, *supra*, p. 48.

[21] Senate Hearings, *supra*, p. 155.

paragraphs, now Section 3, First (w), and 3, Second, had been added to the bill by the time it came before the House Committee. They provided (1) that any division of the adjustment board might establish regional boards, and (2) that any carrier or group of carriers could agree with the representatives of its or their employees to establish system, group, or regional boards, which would take the place of the national board in so far as that carrier or carriers were concerned. Mr. Eastman supported the bill with these amendments, which he thought sufficient to meet the objections raised. This would seem to indicate that the uniformity in decision which might have resulted from the creation of only a single board was regarded as less consequential than the establishment of boards satisfactory to the parties. The important thing, obviously, was to have an adjustment board, whether local, regional, or national, definitely available for all disputes of the type in question.

The bill, substantially in the form submitted by Mr. Eastman (78 Cong. Rec. 12391, 12371), was reported favorably by both legislative committees. The House report (H. Rep. No. 1944, 73d Cong., 2d Sess.), after summarizing the conditions which made the amendment necessary, stated (p. 3):

> This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of

> a national board of adjustment to which these disputes *may* be submitted if they shall not have been adjusted in conference between the parties. * * * [Italics supplied.]

When the carriers and employees could agree to establish similar regional or system boards, they were to be "exempt from the jurisdiction of this National Board" (*id.*, p. 4). If a board deadlocked on a decision, impartial referees were to be chosen by the board members, or if necessary, by the Mediation Board. The House report[22] concludes (*ibid.*):

> The committee is confident that this bill strengthens the Railway Labor Act, where it is necessary to do so, and feels sure that if the act is amended as proposed in this bill, it will provide effective and adequate machinery to adjust controversies between the carrier managements and employees. It will assure employees the right to bargain collectively and will contribute immeasurably to the establishment and maintenance of industrial peace.

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[22] The debates on the 1934 Act add little to the committee reports. The only remarks which might seem to bear upon the question is that of Representative Mead, supporting the bill, who stated that "* * * this bill sets up an orderly procedure for the settlement of grievances and disputes that arise upon the railroads of the country. It augments and supplements existing law; * * *" (78 Cong. Rec. 11718). This suggests that preexisting judicial remedies were not to be destroyed. But this statement referred to the Act generally, and may not have had the present problem in mind.

The Act was passed in June 1934 without any change in these provisions (48 Stat. 1185).

2. *The practice of the present Board.*

As has been shown, the present Adjustment Board is an outgrowth of the boards established by agreement of the parties. Under such agreements, disputes were first to be handled on the property of the carrier, and when they were not disposed of satisfactorily at that stage, the members of the boards were to settle the disputes by "adjustment," a process which was probably in part adjudication and in part bargaining. The preliminary stages of negotiations on the property are the same under the Railway Labor Act as under the earlier agreements, and the Board itself is selected by the parties in substantially the same manner as its predecessors. The source of the present Board's powers, however, is not the will of the parties, but the statute. The Act makes provision for referees if the parties deadlock on awards, and thus permits decisions to which the parties have not agreed (Sec. 3, First (l)). It seems to impose certain of the fundamental procedural requirements common to federal administrative bodies. (See Sec. 3, First (j).) And the Board's decisions can be enforced in the courts in the same manner as those of such familiar agencies as the Interstate Commerce Commission (Sec. 3, First (p)).

Whether in this background "the work of the Board should be denominated 'adjustment', as the

Board's name implies, or whether it is adjudication, is a matter of interpretation on which opinions differ widely. The question is not merely the empty one concerning what labels should be attached for convenience, but it is one on which several important problems hinge. In a sense, the Board's work is only an extension of the machinery for settling disputes on the property of the carriers. When the employee and his foreman discuss a grievance of the employee, they are adjusting rather than adjudicating, and the same is true when the representative of the local union considers the case with the local superintendent. The controversy does not take on an adjudicatory character as it goes on up through the hierarchy of railroad and labor representatives. If the controversy is not settled on the property, the question then is presented to still other 'representatives' of the parties, namely, the members of the Adjustment Board. The carrier and labor members differ in their analysis of the work of the divisions." Attorney General's Committee on Administrative Procedure, *Railway Labor,* Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., pp. 4–5 (*Compilation,* pp. 230–232). The carrier members have maintained that "the most cursory examination of the nature of the arguments put up to the Board and the grounds of its decisions where these are given, conclusively demonstrates that it regards its function as one of strict legal

interpretation rather than compromise and adjustment" (*ibid*). The labor members, on the other hand, have taken the position that the Board "should operate as a continuation of the conference room method employed upon the various properties where men and management 'talk things through,' argue the meaning of rules, discuss the application in effect under those rules, and finally attempt to reach an equitable 'adjustment' based upon our practical knowledge of how things are done 'back home' " (*ibid*). The Attorney General's Committee found that "in any event, when a referee is called in, the proceeding before the Board is much like true adjudication" (*ibid*).

This Court is not now called upon to resolve the troublesome question as to the nature of the Board and its functions. We have called attention to the controversy, however, because it affects the practice of the Board in several respects pertinent here.

(a) As a result of their view that the Board is a continuance of the negotiations on the property, the employee members have refused to permit the Board to hear cases not submitted by the organization representing the majority of a craft or class. Each division of the Board deadlocks as to whether cases submitted by individuals may be heard at all, and the result has been that they have

not been heard."[23] In at least three instances referees appointed to break such deadlocks have held that individuals have no standing before the Board. *Gooch* v. *Ogden Union Ry. Co.*, National Railroad Adjustment Board, Second Division, Award No. 514 (Referee McAllister); *Everly* v. *Erie R. Co., id.*, Award No. 515 (Referee McAllister); *Rudd* v. *Minneapolis, etc. Ry. Co.*, National Railroad Adjustment Board, Third Division, Award No. 1718 (Referee Sharpe). Whether this result is right or wrong,[24] it has the effect of preventing persons whose cases are not sponsored

[23] This question is discussed in Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., pp. 7–10; *Compilation*, pp. 233–234. The *Final Report of the Attorney General's Committee on Administrative Procedure* states (p. 188): "The Board has deadlocked upon the question whether employees in person, as distinguished from labor organizations, should be permitted to bring their claims before the Board. The effect of this deadlock has been that no such claims are set down for hearing."

[24] The statute declares that the Board shall hear "disputes between an *employee* or group of employees and a carrier or carriers" (Section 3, First (i)), that "Parties may be heard either *in person*, by counsel, or by other representatives, as they may respectively elect" (Section 3, First (j)), that notice of hearing shall be given "to the *employee* or employees and the carrier or carriers involved" (*ibid.*), and that *any person* for whose benefit an award is made may sue on the award in a United States District Court (Section 3, First (p)). (Italics supplied.) The courts have indicated that they disagree with the view that individuals have no right to appear before the Board except through the labor organizations. *General Committee of Brotherhood of Locomotive Engineers* v. *Southern Pacific Company*, 132 F. (2d) 194 (C. C. A. 9); *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7),

by the majority organization from having their claims decided by the Board, and if the Board were regarded as having exclusive jurisdiction, would make the organizations' decisions as to their cases conclusive.

(b) The Board's procedure is more closely akin to that of the boards which were its predecessors than to that of the ordinary administrative agency. There are no responsive pleadings; both sides of the case must be submitted simultaneously (Attorney General's Committee on Administrative Procedure, *Railway Labor,* Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., pp. 11–12 (*Compilation,* pp. 238–239)). The material submitted consists of intermingled fact and argument; the Board has no power of subpoena and evidence is not taken, although oral arguments are heard (*id.,* at pp. 12–14, *Compilation,* pp. 239–242). The case is explained to the referee by the other members of the Board, not by the parties (*id.,* at pp. 15–16, *Compilation,* pp. 242–243). Although the Attorney General's Committee made some suggestions for the improvement of this procedure, it did not find it to be fundamentally unfair. See *Final Report of the Attorney General's Committee on Administrative Procedure,* pp. 185–188; see also Garrison, *The National Railroad Adjustment*

certiorari denied, 300 U. S. 673; *Estes* v. *Union Terminal Company,* 89 F. (2d) 768 (C. C. A. 5). See also House Hearings, p. 83; William H. Spencer, *The National Railroad Adjustment Board* (University of Chicago Press, 1938), p. 39, *Compilation,* Appendix, p. 189.

Board: A Unique Administrative Agency, 46 Yale L. J. 567 (1937), reprinted in *Compilation,* Appendix, pp. 110–135. The facts of the cases are usually well known to the parties and disclosed by the file of the negotiations on the property. The Attorney General's Committee estimated that in only five percent of the cases were there any fact issues with respect to which evidence would have been helpful (*Final Report,* p. 187).

The Court is not, of course, required in this case to pass upon the validity of these departures from orthodox administrative procedure. We have referred to them so that the Court may have the information before it, in view of petitioner's contention that the Board's procedure should be given consideration in determining whether the Board's jurisdiction is exclusive and its awards "final and binding."

(c) The bipartisan nature of the Board is reflected both in its inability to agree on rules of procedure and in the failure of the First Division, from which this case arose, to keep up with its docket. In 1940, when the report of the Attorney General's Committee on Administrative Procedure was prepared, the Division was "more than three years behind its docket" (p. 188). Between 1940 and 1942 the number of undisposed cases on hand at the close of the fiscal year rose from 4298 to 6033, leaving the Division between four and five years behind (National Mediation Board,

Eighth Annual Report, p. 45).[25] The members of the Division have been unable to agree upon a means of removing this congestion, although the statute permits them to sit in panels (Sec. 3, First (k)), or to establish regional boards (Sec. 3, First (w)).[26] This condition might affect the desirability of making the Board the exclusive forum for the disposition of such cases.

3. *The adjustment boards and the courts.*

The reported cases arising before the 1934 Act, and involving the interpretation of railway labor agreements establishing an adjustment procedure, fall into several categories. Some of these proceed to interpret the agreement without regard for, or even awareness of, the availability of any other procedure, although it would appear that an adjustment board covering the employees and carriers involved was in existence.[27] Other cases hold that an employee must avail himself of the adjustment provisions of the contract governing

[25] The Railway Labor Act of 1934 was entitled "AN ACT * * * to provide for the *prompt* disposition of disputes between carriers and their employees" (48 Stat. 1185. [Italics supplied.] See also Sec. 2 (General Purposes (4, 5)).

[26] At the present time the Office of Defense Transportation, at the request of the President, is endeavoring, thus far unsuccessfully, to see if the parties will agree to steps through which the jam can be broken.

[27] See, e. g., *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936). The Louisville & Nashville Railroad was a party to the agreement creating a Southeastern Regional Adjustment Board for train service employees (*Compilation*, Appendix, pp. 39–42; see pp. 14, 16, *supra*).

his crafts before resorting to the courts; these decisions generally are based upon the principles of contract law,[28] although there is occasional reference to the Railway Labor Act as well.[29] And another group of cases holds that an employee can go to court without availing himself of the remedies prescribed in the contract or under the Act where for one reason or another such action would be futile.[30]

After the 1934 Act became effective, but before this Court's decision in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, there were only a few reported instances of suits brought by employees who had not gone to the Adjustment Board.[31] The Fifth

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[28] *Harrison* v. *Pullman Co.*, 68 F. (2d) 826 C. C. A. 8); *Bell* v. *Western Railway*, 228 Ala. 328, 153 So. 434 (1934); *Wyatt* v. *Kansas City Ry. Co.*, 101 S. W. (2d) 1082 (Tex. Civ. App., 1937); *Swilley* v. *Galveston, etc., Ry. Co.*, 96 S. W. (2d) 105 (Tex. Civ. App., 1936); *Matlock* v. *Gulf, C. & S. F. Ry. Co.*, 99 S. W. (2d) 1056 (Tex. Civ. App., 1936); *Cousins* v. *Pullman Co.*, 72 S. W. (2d) 356 (Tex Civ. App., 1934); *Reed* v. *St. Louis S. W. R. Co.*, 95 S. W. (2d) 887 (Mo. App., 1936).

[29] *Bell* v. *Western Ry.*, 228 Ala. 328, 153 So. 434 (1934); *Wyatt* v. *Kansas City Ry. Co.*, 101 S. W. (2d) 1082 (Tex. Civ. App., 1937).

[30] *Youmans* v. *Charleston & W. C. Ry. Co.*, 175 S. C. 99, 178 S. E. 671 (1935); *Mallehan* v. *Texas & Pacific Ry. Co.*, 87 S. W. (2d) 771 (Tex. Civ. App., 1935).

[31] *McDermott* v. *New York Central R. Co.*, 32 F. Supp. 873 (S. D. N. Y.); *Evans* v. *Louisville & N. R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611 (1940); *Ledford* v. *Chicago, M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 306, 18 N. E. (2d) 568 (1939). In the *Ledford* case the complainants had sought to go to the Adjustment Board, but the Board had refused to docket the case. See pp. 25–26, *supra*.

Circuit Court of Appeals had held in the *Moore* case itself that preliminary resort to the Adjustment Board was unnecessary, and there was a dictum to the same effect in *Nord* v. *Griffin*, 86 F. (2d) 481, 483–484 (C. C. A. 7), certiorari denied, 300 U. S. 673. There have been several independent court actions by employees since then.[32] These cases have held that under the rule of the *Moore* case an employee has an election between suing in court and proceeding before the Board, but that he cannot do both.[33] So far as we know, there have been no cases brought by carriers before submission of a claim to the Adjustment Board.

More significant than the small number of decisions is the apparent attitude, if it can be so called, of the parties toward the judicial method of resolving this type of controversy. In so far as the legislative history of the 1934 Act indicates, it never occurred to anyone that the courts afforded a forum in which such matters might be determined. Prior to 1934, it was assumed that if disputes were not disposed of by the parties amicably or by an adjustment board the only alternative was to threaten the use of economic

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[32] *Adams* v. *New York, C. & St. L. R. Co.*, 121 F. (2d) 808, 810 (C. C. A. 7); *Austin* v. *Southern Pac. Co.*, 123 P. (2d) 39 (Cal. App., 1942); *Burke* v. *Union Pacific R. Co.*, 129 F. (2d) 844 (C. C. A. 10); *Swartz* v. *South Buffalo Ry. Co.*, 44 F. Supp. 447 (W. D. N. Y.).

[33] *Adams* v. *New York, C. & St. L. R. Co.*, 121 F. (2d) 808, 810 (C. C. A. 7); *Austin* v. *Southern Pac. Co.*, 123 P. (2d) 39 (Cal. App., 1942).

force. We do not know whether the failure of the employees to resort to the courts was due to a belief that such matters could not be heard in the courts, to a belief that the judicial remedy was expensive and time consuming and that the carrier had superior facilities for engaging in litigation (R. 334), to a feeling that the courts were not sufficiently expert or inclined to understand the employees' point of view, or merely to the employees' greater faith in their own bargaining power—or to these factors in combination. Whatever the reason, it is clear that the industry regarded some other type of machinery as essential.

The reluctance of labor to use the courts is evidenced by its failure to make any extensive use of the enforcement procedure available under Section 3, First (p) after awards had been entered in its favor. The various divisions of the Adjustment Board have entered thousands of awards.[34] Only a few have been enforced through proceedings instituted under paragraph (p).[35]

[34] The number of awards is stated in the Annual Reports of the National Mediation Board.

[35] Reported cases are: *Atlantic Coast Line R. Co.* v. *Pope*, 119 F. (2d) 39 (C. C. A. 4); *System Federation No. 59* v. *La. & Ark. Ry. Co.*, 119 F. (2d) 509 (C. C. A. 5), certiorari denied, 314 U. S. 656; *Thomas* v. *Texas & N. O. R. Co.*, 118 F. (2d) 75 (C. C. A. 5) (for the same case see also 162 S. W. (2d) 1039 (Tex. Civ. App., 1942)); *Cleapor* v. *Atlanta, B. & C. R. Co.*, 123 F. (2d) 374 (C. C. A. 5); *Virginian Ry. Co.* v. *System Federation No. 40*, 131 F. (2d) 840 (C. C. A. 4); *Smith* v. *Texas & N. O. R. Co.*, 32 F. Supp. 1013 (W. D.

The Attorney General's Committee on Administrative Procedure found:[36]

> Theoretically, the railroads do not need to comply with an award until an action is brought in court to enforce the award. The theory does not accord with the fact, however. Of about 5,000 awards that the Board has made to date, not more than a half dozen enforcement proceedings in court have been brought, and yet the great preponderance of the awards have been complied with. Some awards, however, are never enforced either by court action or by economic force, either because of doubts as to the success of litigation, or because of insufficient general importance.

This report, an article by Dean Lloyd Garrison,[37] and the brief of the respondents in the District Court (R. 103) recognize that the primary sanction relied on to enforce the Board's orders has been the economic bargaining power of the employees, and we do not think it will be denied that the employees' organizations whose cases are

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La.); *Alabama State Federation* v. *Kurn*, 46 F. Supp. 385 (N. D. Ala); *System Federation No. 8* v. *Missouri-K.-T. R. Co.*, 40 F. Supp. 803 (N. D. Tex.); *Cook* v *Des Moines Union Ry. Co.*, 16 F. Supp. 810 (S. D. Iowa). Only the last of these cases involved a decision of the First Division of the Adjustment Board.

[36] Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., p. 6 (Compilation, p. 233).

[37] Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 591–592 (1937) (*Compilation*, Appendix pp. 129–130).

handled by the First Division have adopted the policy of not taking cases to the courts."[28] There have been approximately eight threats to strike against carriers which declined to comply with orders of the Adjustment Board. These disputes were all settled peacefully, generally through compliance by the carrier with the Board's awards.[29]

There have also been a few suits to enjoin carriers from giving effect to Adjustment Board orders. *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7), certiorari denied, 300 U. S. 673; *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5); *Brand* v. *Pennsylvania R. Co.*, 22 F. Supp. 569 (E. D. Pa.); *Stephenson* v. *New Orleans & N. E. R. Co.*, 180 Miss. 147, 177 So. 509 (1937); *Railroad Yardmasters of North America* v. *Pittsburgh & Lake Erie R. Co.*, 39 F. Supp. 876 (N. D. Ohio). These cases have generally been brought by employees aggrieved by Board decisions affecting their seniority, not by the railroad labor organization, and injunctions have been granted when it was found that the Board had violated due

[28] The position of the employees' representatives is that if they accept the awards, the carriers should do likewise, that they have no means of contesting an award when they lose and that accordingly it is unfair to give the carrier a chance to challenge an award when it loses, that taking the cases to court would cause further long delays before awards were obeyed, and that the carriers have a large body of lawyers available to give them an unfair advantage over the employees if cases have to be taken to court.

[29] This information was obtained from the files of the National Mediation Board.

process by not giving the claimants notice of its hearings (*Nord* v. *Griffin; Brand* v. *Pennsylvania R. Co., supra*) or that the Board had acted without jurisdiction (*Stephenson* v. *New Orleans & N. E. R. Co., supra*).

B. WHETHER PARTIES MAY RESORT TO THE COURTS BEFORE SUBMISSION OF A CONTROVERSY TO THE NATIONAL RAILROAD ADJUSTMENT BOARD

In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, this Court held that an employee was not required to seek adjustment of his controversy with a carrier before the National Railroad Adjustment Board as a prerequisite to the institution of a lawsuit. The United States filed a brief as *amicus curiae* in the *Moore* case. The Government was of opinion that the question was a close one, and that the various factors to be considered did not point conclusively in either direction. We suggested that a possible solution of the problem would be to permit court action by individuals who could not, without the use of some mandatory process, bring their cases before the Adjustment Board, but not otherwise.

The Court held, however, that resort to the statutory machinery was not compulsory. The Court has now requested a reconsideration of the matter. Even if the Court should not treat the *Moore* case as controlling, the choice it made between the various arguments advanced is entitled to weight. It is on this basis that we have reexamined the questions decided in the *Moore* case.

1. Considerations relating to the Railway Labor Act

(a) The statute declares that unadjusted disputes *may* be referred to the Adjustment Board. The word "may" could have been used either to show that parties were not required to go before the Adjustment Board at all, or that they need not appeal a particular case unless they desired to do so. In the *Moore* case, this Court adopted the former interpretation, saying (312 U. S., at 635):

> It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a "dispute shall be referred to the designated Adjustment Board by the parties, or by either party * * *" This difference in language, substituting "may" for "shall", was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. * * *

The legislative history of the 1934 Act is consistent with the above conclusion.[39a] The advantages which Mr. Eastman thought would accrue from the uniform interpretation of railway labor agreements by a single body did not lead to his refusal to accept regional or local adjustment boards, whenever the parties could agree to establish them (see pp. 19–21, *supra*).

(b) The primary purpose of the Railway Labor Act was the settlement of disputes peacefully without interruption to transportation. Since judicial proceedings are a peaceful means of resolving disputes, the possibility of resort to the courts is entirely compatible with this basic objective. On the other hand, the uniform interpretation of such agreements by a single expert tribunal would eliminate the possibility of discrimination between men working on different parts of the same road or on different roads, and thus remove one cause of dissatisfaction and controversy.[40] Fur-

[39a] The *Moore* opinion refused to draw the inference that the Board was intended to have as broad a jurisdiction as the prior adjustment and arbitration (see pp. 85–88, *infra*) boards to which disputes were required by agreement to be submitted.

[40] See Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567 (*Compilation*, Appendix, pp. 110–135). The cases which come before the Board arise out of numerous technical rules with "intricate" interpretations. Attorney General's Committee on Administrative Procedure; *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., p. 3 (*Compilation*, p. 229); Garrison, *supra*, pp. 586–591 (*Compilation*, Appendix, 125–129). A definite advantage is to be derived

thermore, compulsory use of the machinery established by the statute would (except for those cases which go to referees) in substance result in the settlement of cases by agreement between the carriers and the unions. Such a solution of a dispute would probably be more consistent with harmonious labor relations than the peaceful but compulsory acceptance of judicial decisions. We believe that the advantage of decisions to which both sides have agreed is the basic reason for the use of the adjustment board device.

But the benefits of a uniform interpretation by a single body of experts and of a decision resulting from agreement between the representatives of the carriers and the employees are not to be found in the large proportion [41] of the cases which are decided with the assistance of referees. The referees are not necessarily experts in the railway labor field,[42] and their decisions are not neces-

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from having such cases decided by persons familiar with the subject and its terminology, and not by persons having "no practical experience of railroading." Garrison, *supra*, p. 593 (*Compilation*, Appendix, p. 131).

[41] Approximately one-half. See report of Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., pp. 1, 15 (*Compilation*, p. 242); National Mediation Board, *Eighth Annual Report*, p. 45.

[42] Dean Garrison's article states in this connection:

> * * * With rarest exceptions, the referee, to be neutral, must be drawn from outside the railroad world. He comes to the Board with no practical experience of railroading. Its vocabulary, its customs are strange to him. He cannot catch the undertones of

sarily uniform."[43] The parties frequently do not acquiesce in referees' decisions;[44] thus, they do

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the cases, or weigh as surely as one bred to the trade the force of the rival contentions addressed to him. He cannot appreciate with any certainty the implications, for future cases, of the decisions he must render. He has no fellow-judges to consult with. Nearly every case comes up to him evenly balanced, strenuously fought, and freighted with importance not only to both sides but to all other carriers and unions for whom the decision will stand as a precedent. And his will be the final say, for he knows that there will be no review. Try as he will he is bound to make mistakes which a more experienced judge would not make. And these mistakes may be costly and wide-reaching in their effects. When he is through with the cases assigned to him, and has begun to gain some insight, he is not likely to be reappointed to the Division in which he sat, for he will probably be unwanted either by the labor members or the carrier members or both; and the National Mediation Board (which has to make the appointments since the Divisions are not able to agree upon mutually satisfactory persons) quite properly will not appoint unwanted men. * * *

Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 593–594 (*Compilation*, Appendix, p. 131–132). The Annual Reports of the National Mediation Board show that since 1935 only one referee has sat with the First Division during more than three fiscal years, and one other during as many as three fiscal years. Other Divisions have often been able to agree upon referees, and referees have been more frequently reappointed.

[43] See report of Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., p. 19 (*Compilation*, p. 247).

[44] "Yet, identical problems repeatedly have to be carried all the way to a referee before the parties will consider themselves bound. When the same problem has been decided hundreds of times by many different referees, and when all

not have the harmonious effect of a determination agreed upon by representatives of both sides.

The cases submitted to the referees comprise those in which there is undoubtedly the bitterest conflict. We are not inclined to believe that there is any great difference in the effect upon amicable labor relations between decisions rendered by the referees in such cases (most of whom now are judges),[44] and those rendered by courts. In

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decisions are in agreement, principles that should be regarded as established are not always recognized by the parties. * * * In the application of the 'road yard' rule, for instance, the decisions have uniformly accepted the basic principle advocated by labor, but the carriers have consistently refused to acquiesce in that principle. As a result cases involving the 'road yard' rule are seldom settled on the property of the carrier, the Board nearly always deadlocks such cases, and they almost invariably have to be decided by referees. The failure to acquiesce in decisions of the Board is one substantial cause of the large volume of business of Division I. * * *" *Ibid.* Illustrative of the parties' attitude are (1) the withdrawal by the employees of cases submitted to Justice Royal A. Stone as referee after his conclusions had been made known but before his opinions were filed, and the resubmission of the cases to the Board in the hope of getting a different result (*Delaware & Hudson R. Corp.* v. *Williams*, 129 F. (2d) 11 (C. C. A. 7), judgment vacated December 7, 1942, Nos. 446-447, this Term), and (2) the attempt by the carriers to disqualify Justice Paul W. Richards as referee because of disagreement with some of his prior decisions in other cases (See National Mediation Board, *In the Matter of Protest of Carrier Members against the appointment of Justice Paul W. Richards as Referee*, decided June 5, 1941; *Seventh Annual Report*, p. 11).

[44] In the past several years, the National Mediation Board has generally appointed State supreme court judges as referees. National Mediation Board, *Seventh Annual Report*, p. 46; *Eighth Annual Report*, pp. 46–47.

each instance the decision is reached by the peaceful process of adjudication, and a strike against it is unlikely. In neither instance does the losing party regard the decision as one to which he has agreed. It is not unlikely that the judgment of a court, which is directly enforceable, would be treated with more respect than is such an award of the Board."

(c) The practice of the Board in refusing to hear cases not submitted by the representative of the majority of a craft is not consistent with the notion that the Board has exclusive jurisdiction of the type of cases which come before it. See pp. 25–27, *supra*.

(d) Most courts, both before and after this Court's decision in the *Moore* case, seem to have held, or assumed, that the jurisdiction of the Adjudgment Board is not exclusive. See pp. 29–31, *supra*.

2. Considerations applicable to administrative bodies generally

It can be argued that the establishment of the Adjustment Board in itself manifests a congressional intention that all disputes coming within its jurisdiction be submitted to it rather than to the

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[46] See Note 44, *supra*. Since a judicial decree is enforceable, employees would never be faced with the necessity of threatening to call a strike to obtain compliance with a court order, although they have engaged in such tactics with respect to some Adjustment Board awards. See pp. 33–34, *supra*.

courts. But it can also be argued that the failure of Congress to declare that the Board was to have exclusive jurisdiction, in a field in which common-law remedies are available, indicates that the pre-existing remedies were not to be destroyed.

Examination of the language of statutes creating other administrative bodies and of the decisions under them reveals the absence of any uniform legislative or judicial policy which might be controlling here. In some instances Congress has specified that an administrative remedy is to be exclusive, as in the National Labor Relations Act [47] and the Longshoremen's and Harbor Workers' Compensation Act.[48] Frequently it is clear from the fact that the statute regulates an entirely new field that only statutory remedies are to be available.[49] On the other hand, Congress has also specifically provided, as in the Interstate Commerce Act,[50] the Civil Aeronautics Act [51] and the statutes administered by the Securities and Exchange Commission, [52] that existing remedies are

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[47] c. 372, 49 Stat. 449, 29 U. S. C., Section 160 (a); *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261.

[48] c. 509, 44 Stat. 1424, 33 U. S. C., Section 905.

[49] See, *e. g.*, Bituminous Coal Act, c. 127, 50 Stat. 72, 15 U. S. C., Sections 828–851; Packers and Stockyards Act, c. 64, 42 Stat. 159, 7 U. S. C., Sections 181–231.

[50] c. 104, 24 Stat. 379, 49 U. S. C., Section 22.

[51] c. 601, 52 Stat. 973, 49 U. S. C., Section 676.

[52] c. 38, 48 Stat. 74, 15 U. S. C., Section 77p; c. 411, 53 Stat. 1149, 15 U.S.C., Sections 77www (b); c. 404, 48 Stat. 881, 15 U. S. C., Sections 78bb; c. 687, 49 Stat. 803, 15 U. S. C., Section 79p.

not to be abridged. And some statutes, such as the Safety Appliance Act,[53] which contains no express provision one way or the other, have been construed as permitting private persons to enforce their rights in courts as well as before the administrative tribunal.

Most pertinent would appear to be the interpretation given Section 16 (2) of the Interstate Commerce Act, which is in substantially the same language as Section 3, First (p) of the Railway Labor Act, and upon which the latter provision was modeled. See p. 91, *infra*. In a long series of cases, this Court has held that when a question presented is administrative rather than judicial, or where there was an evidentiary question upon which fact-finding bodies might differ and thus interfere with the uniformity which the Interstate Commerce Act was designed to secure, the matter must first be submitted to the Interstate Commerce Commission. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, and cases cited at 295 n. But where the question was merely whether there had been compliance with a tariff, or was one of construction of words

[53] c. 160, 36 Stat. 298, c. 225, 35 Stat. 476, 45 U. S. C., Sections 15, 19; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 39.

used in their ordinary sense, preliminary resort to the Commission was unnecessary. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 134; *Pennsylvania R. R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120; *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; and cases cited at 295 n.; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448.

The drawing of conclusions from one statute as to the interpretation to be given an entirely different law is an uncertain approach, even where some of the language employed is similar. Although Sections 16 (2) of the Interstate Commerce Act and 3, First (p) of the Railway Labor Act are substantially the same, the other differences between the two statutes are so great as to make it clear that each section must be fitted into its particular setting. The Interstate Commerce Act specifically gives a shipper a choice between a suit in court and the commencement of proceedings before the Commission (Section 9). It further provides (Section 22) that:

> * * * nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the remedies of this act are in addition to such remedies * * *.

Despite these seemingly explicit provisions, it is established, as we have indicated, that in certain types of cases a complaint must first go before the Interstate Commerce Commission in order that

the basic objectives of the vital substantive provisions of that Act may be achieved.

The primary reason for first requiring resort to the Interstate Commerce Commission in such cases does not apply to the Adjustment Board. The latter body does not exercise administrative discretion; nor do many of its decisions turn upon disputed questions of fact. See pp. 27–28, *supra*. To the extent that they do, the Board is in some respects less fitted to resolve them than are the courts, since the Board has no subpoena power and under its rules does not permit the presentation of evidence or the examination of witnesses.[54] The Adjustment Board, all of whose permanent members are experienced railroad men, may however, be more expert than the courts in interpreting the contracts over which it has jurisdiction.[55] In so far as a uniform interpretation is deemed desirable, it would be wise to require cases involving such contracts first to be submitted to the Board. But the provisions in the Act for the creation of regional and local adjustment boards show that the object of the Railway Labor Act was not primarily to secure uniformity in the interpretation of these agreements.

In view of these considerations, we believe that no definite conclusion can be drawn from an anal-

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[54] Report of Attorney General's Committee on Administrative Procedure, *Railway Labor*, Sen. Doc. No. 10 (Part 4), 77th Cong., 1st Sess., p. 6n. (*Compilation*, p. 233n.).

[55] *Ibid.*

ysis of the Interstate Commerce Act or any other statute as to whether the Board established under the Railway Labor Act was intended to have exclusive jurisdiction. The variety of statutes and decisions shows that the present problem cannot be solved by any automatic rule pursuant to which a statute establishing an administrative body is inevitably construed in one way or the other. In each case all of the manifold factors which guide courts in construing statutes are given consideration, and the determination made as to what Congress would have intended in the particular act involved.

When a statute creates new rights and establishes an agency to administer them, it may normally be presumed, even in the absence of express language to that effect, that the legislature intended the agency to have exclusive primary jurisdiction. But the Adjustment Board does not administer or pass upon rights created by the Railway Labor Act, but upon contract rights previously recognized and enforced in other forums. The Board is also not strictly comparable to other administrative bodies, in that it stems from boards established by agreement whose functions were clearly the settlement of disputes through adjustment rather than adjudication.

It is conceivable that Congress could have designed the Adjustment Board either as a supplement to or a substitute for the existing remedies for breach of railway labor contracts. Whether it has or not must be determined by the particular

intention of the Congress which passed the Railway Labor Act, rather than by the invocation of any general principle of administrative law.

3. Conclusion

As was indicated by the Government's brief in the *Moore* case, we think that the question as to whether an employee or carrier may proceed only before the Adjustment Board is a close one. The various manifestations of congressional intention point to no definite conclusion. In such circumstances, the controlling consideration should be the effect of the proposed interpretation upon the attainment of the objectives of the Railway Labor Act, provided that this may not be said to be inconsistent with the *method* intended by Congress.

With respect to disputes settled without referees, decisions by a board made up of representatives of the carriers and the employees are more likely to be willingly accepted by both sides, and thus less likely to result in interruptions to commerce, than would the decisions of courts. This is less true, we believe, as to the cases decided with the assistance of referees. Experience under the present Board suggests that judicial determinations would cause no more, and might cause less, ill feeling than the decisions of the referees (see p. 39, n. 44, *supra*). However, the possibility of resort to different tribunals in itself might result in disharmony, to the extent that court and Board decisions might be less uniform

than decisions of the Board alone including its referees.

In so far as actual interruptions to transportation are concerned, we cannot say that strikes are more likely to occur if the parties are permitted to take their cases either to the courts or to the Board. Such cases have almost invariably been brought by the employees rather than by the carriers. In accordance with their past practice, the railroad labor organizations would almost certainly take their cases to the Board, and if they chose to use the courts in a particular instance, there would be no reason to anticipate that the judicial decision would not dispose of the controversy. Most of the cases taken to the courts probably would be brought by individual employees or groups not desiring to have their cases handled by the majority organization. This is the situation at the present time. Such persons or groups might be unable to induce the Board to decide their cases at all, or might be unwilling to submit themselves to a bipartisan board where the interests of the labor members might well be adverse.[56] We assume that even if it should be held that the employees were as a general rule required to go to the Board instead of to court, this would not apply to persons whose cases the Board refused to hear.[57]

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[56] E. g., *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7), certiorari denied, 300 U. S. 673; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

[57] See cases cited, *supra*, p. 30, n. 30, and *Ledford* v. *Chicago M., St. Paul & P. R. Co.*, 298 Ill. App. 298, 18 N. E.

The considerations which we have advanced were, in substance, before this Court when the *Moore* case was heard in 1940. The Court held at that time that the statute did not preclude a party from resorting to the courts without first going to the Adjustment Board. We assume that under the principle of *stare decisis* decisions of this Court will not be overruled lightly or unnecessarily. Once the Court has decided a question one way, the burden of persuasion should be on the one who seeks to have the decision overruled. Since we are not convinced that the conclusion reached in the *Moore* case was erroneous, or that it has in any way impaired the effectiveness of the Railway Labor Act as a means of avoiding interruptions to commerce, we do not feel justified in requesting its reversal.[58]

(2d) 568 (1939). In the *Moore* case, the record did not show that the plaintiff had requested the majority organization to take his case to the Board, or that he had done so himself, but his past relations with the organization were such that he might reasonably have assumed either that it would have refused to handle his case or not represented him very zealously.

[58] Inasmuch as there was no evidence in the *Moore* case that the plaintiff had attempted to have the labor organization take his case to the Board, or that he had tried to do so himself (see n. 57 *supra*), the case cannot be distinguished on the ground that it involved a situation in which such efforts were unsuccessfully made. If the Court should desire to limit the *Moore* decision, it should not require an employee to do more than show that the majority union has declined to present his case. Since the filing of proceedings with the Board by the individual would under such circumstances be futile, and since the Board generally does not issue a formal

C. WHETHER PARTIES MAY RESORT TO THE COURTS AFTER SUBMISSION OF A CONTROVERSY TO THE NATIONAL RAILROAD ADJUSTMENT BOARD

The problem presented after a case has been submitted to the Adjustment Board differs from that previously considered. The existence of alternative means of resolving disputes as to the interpretation of railway labor agreements does not foreclose giving exclusive effect to the machinery created by the Railway Labor Act once it has been invoked. The statutory provision primarily involved *before* the case comes to the Board is Section 3, First (i); the provision concerning enforcement of the Board's orders after it has acted is Section 3, First (p), which reads as follows:

> If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall

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ruling declining jurisdiction, to require a refusal by the Board itself would merely serve to exhaust the period of limitations in which a person would be able to sue in court.

> proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

The question may be separately considered in relation to two chronological periods: (1) while the proceeding is pending before the Adjustment Board, and (2) after the Board has made its decision.

1. While the proceeding is pending before the Adjustment Board

Since this question is not raised in the present case, it is unnecessary to consider it at length. We think it clear, however, that when Congress provided that the parties might submit unadjusted

disputes to the Adjustment Board, and that the Adjustment Board might enter awards and orders, it did not intend that the proceedings before the Board could be set at naught by an independent action seeking a determination of the same question before another tribunal.

Such suits would be based upon contracts, and would be actions *in personam*. Under the rule governing concurrent suits *in personam* in federal and state courts [89] two actions may proceed independently, although a judgment in either is *res judicata* in the other. *Kline* v. *Burke Construction Co.*, 260 U. S. 226; *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 195; *Princess Lida* v. *Thompson*, 305 U. S. 456, 466. The result would be that if one party to a dispute instituted proceedings before the Board and the other party preferred a different forum, the latter could file a suit in court. If the cases were so timed that judgment was first rendered in the judicial proceeding, the jurisdiction of the Board would be lost, and the statutory machinery made inoperative.[90]

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[89] The judicial proceedings would normally be brought in a state court, unless the requisites of federal jurisdiction were present. Such suits are not regarded as based upon the Railway Labor Act or any federal statute. *Malone* v. *Gardner*, 62 F. (2d) 15 (C. C. A. 4); *Burke* v. *Union Pacific R. Co.*, 129 F. (2d) 844 (C. C. A. 10); *McDermott* v. *New York Central R. Co.*, 32 F. Supp. 873 (S. D. N. Y).

[90] A decision of the Board, however, would be *res judicata* in the courts only to the extent that the Board's order could not be judicially reviewed; an order could, of course, be set aside in an enforcement suit brought under Section 3,

Such unseemly competition between adjudicatory bodies, even if permissible under the common law, is hardly consistent with the purpose of Congress, as expressed in the Railway Labor Act (Sec. 2), "to provide for the prompt and *orderly* settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Nor would such a race for the tribunal deemed most favorable be conducive to harmonious labor relations. The decisions or awards in such circumstances would not be accepted as the ruling of an impartial, or bipartisan body, but as the unfortunate consequence of being in the wrong court, or of bad timing. Ill will would almost inevitably be engendered. Thus, to construe the Act as allowing resort to the courts while a case was before the Adjustment Board might undermine its primary objective, the peaceful and amicable settlement of labor disputes.

Even apart from the Railway Labor Act the general policy of the courts not to take action which will interfere with proceedings pending before administrative agencies is pertinent. E. g. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. To permit the bringing of an independent suit on the same cause of action while a case is pending before the Board would certainly under-

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First (p). Since the First Division of the Board is now years behind in its docket (see pp. 28–29, *supra*), the judicial proceeding would probably be concluded first.

mine its effectiveness as much as a direct interference with its operations.

2. After the Board has made its decision

After the Board had made its decision, all further proceedings, whether by way of enforcement suit or an independent action on the contract, would take place in the courts. There would thus no longer be the possibility of conflict between judicial and administrative tribunals. The question is whether when Congress established a special judicial procedure through which the Board's orders might be enforced or set aside, it intended that the courts review the orders in other ways.

We believe that this question should be answered in the negative. There would, of course, be no doubt as to this if the statute contained express language making paragraph (p) the exclusive method of judicial enforcement or review. While the problem is not that simple, the adequacy of the statutory remedy, the advantages it was designed to give the employees, and comparison with the closely parallel provisions of the Interstate Commerce Act indicate that paragraph (p) was probably designed as an exclusive review procedure.[61] This conclusion is, to some extent,

[61] As we shall show, the statutory remedy is legally adequate both for the carriers and for employees who invoke the services of the Adjustment Board, whether they win or lose. This might not be the case as to other employees who are adversely affected by a Board award and who are, or should be, parties to a proceeding before the Board. *Nord*

confirmed by the "final and binding" clause in Section 3, First (m), which may be interpreted as requiring that the Board's orders (except for money awards) be final, except as otherwise provided in the Act or required by the Constitution. This is the point raised by this Court's Fourth Question, and it is considered at greater length *infra*, pp. 70–95.

a. *The adequacy of the remedy.* On its face, paragraph (p) purports to provide a remedy only where the award is in favor of the employee and where the carrier does not comply. But the failure of the statute to provide expressly for judicial review at the instance of the carrier does leave the remedy inadequate. This will appear from an analysis of the four situations in which review might be sought: (1) the right of the employee if he is successful before the Board; (2) the right of the carrier when it is successful before the Board; (3) the right of the employee

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v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7), certiorari denied, 300 U. S. 673; *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5); *Brand* v. *Pennsylvania R. Co.*, 22 F. Supp. 569 (E. D. Pa.); *Stephenson* v. *New Orleans & N. E. R. Co.*, 180 Miss. 147, 177 So. 509 (1937). Such persons would have no right to judicial relief under paragraph (p), nor would they be able, as is the carrier, to await a proceeding against them before complying with the award. If the carrier obeys the Board's order, they would be remediless. Such persons have been held entitled to judicial relief by way of injunction in the cases cited, and nothing said in this brief is to be regarded as directed at their special problem. This Court is, of course, not called upon to determine the rights of such persons in this case.

who has lost before the Board; and (4) the right of the carrier who has lost before the Board.

(1) If the employee wins his case before the Board, he may sue for enforcement under paragraph (p).

(2) If the carrier wins before the Board, it has no statutory right to sue. But it has the power to put the Board's decision into effect without the aid of any enforcement procedure. Although the Act permits carriers as well as employees to bring cases to the Board, substantially all of the cases consist of claims by employees against the carriers, seeking either monetary awards or changes in practices allegedly required by the terms of the agreements. The cases are almost invariably brought to the Board by the employee[42] and Congress understood that this would be so.[43] An award in favor of the carrier would deny the employees' claim, and the carrier could put the award into effect itself simply by not paying the amount demanded or otherwise doing what the employee requested.[44] There was accordingly no need for

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[42] See *Final Report of Attorney General's Committee on Administrative Procedure*, p. 186.

[43] Section 3, First (o) speaks of an order in favor of "petitioner", directed to the carrier, and paragraph (p) refers to the "petitioner" bringing suit against the carrier if the latter does not comply with the Board's order. This suggests that Congress assumed that the employee would normally be the petitioner before the Board. See Senate Hearings, p. 33.

[44] The Act was prepared on the assumption that the employees would not strike against unfavorable awards. See

giving the carrier a remedy such as that made available to the employee in paragraph (p). This was pointed out to the House Committee by Coordinator Eastman [64] and his assistant, Mr. Carmalt.[65] Mr. Carmalt stated that "the carrier had the power in its hands to enforce the awards of the Board as against the individual."[66]

(3) An employee who has been denied relief by the Board would appear to have no further remedy. He certainly has none under the Act. The carrier can proceed to make such an award effective by itself (*supra*). The employees' position would seem to be the same as that of a shipper who has unsuccessfully brought a claim for reparations before the Interstate Commerce Commission. If he loses he cannot have the order overturned in court.[67] This results under the Railway Labor Act from the fact that the employee voluntarily invoked the services of the Board, foregoing his alternative right to sue in court in the first instance (*Moore* v. *Illinois Central R.* Co., 312 U. S. 630, see pp. 35–49, *supra*.[68]

House Hearings, pp. 63–64, 58–59; Senate Hearings, p. 35. This assumption has been justified. The strike threats referred to by petitioner were to compel the carriers to obey awards in favor of the employees.

[64] See House Hearings, p. 61.

[65] *Id.*, at page 63.

[66] *Ibid.*

[67] See pp. 62–64, *infra*.

[68] This reasoning of course would not apply if the Court should now overrule the *Moore case* and hold that the employees could not resort to the courts in the first instance.

Once he has made his election to use the statutory machinery, he cannot complain that the remedy is inadequate. Cf. *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 457–458; *Austin* v. *Southern Pac. Co.*, 123 P. (2d) 39 (Cal. App. 1942).

(4) The position of an unsuccessful carrier before the Board is greatly superior to that of an unsuccessful employee. For the Board's award is not self-enforcing against the carrier. Thus, the carrier can refuse to comply until and unless a proceeding is brought against it under paragraph (p). When such a suit is brought, the award is only *prima facie* evidence of the facts stated, and the carrier can defend as in any other civil action. That such a procedure provides an adequate remedy for the losing party, consistent with the Constitution, would seem to follow from the reparations cases under the Interstate Commerce Act. *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Cook* v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810 (S. D. Iowa).

The inability of the carrier to bring an independent action to set aside the award does not make this defensive remedy inadequate. Prior to the passage of the declaratory judgment acts,[10] persons against whom claims of breach of contract were made could not initiate actions to obtain an interpretation of the contract. Although

[10] The Federal Declaratory Judgment Act was passed on June 14, 1934, a week before the Railway Labor Act of 1934. See 48 Stat. 955, 1185.

this may have been inconvenient for them, it was never thought that this disability, which left them with full power to assert their rights defensively in an action brought against them, was unconstitutional. The Railway Labor Act, enacted one week after the Declaratory Judgment Act, was drafted and approved by the congressional committees before the Declaratory Judgment Act became law, and it can hardly be said to have been designed with an eye toward procedural remedies which were non-existent until the latter act was passed.

The petitioner claims that the statutory remedy is inadequate because the employees have usually not brought suit under paragraph (p), but have threatened to strike if the carrier did not comply with the award. This has happened on eight occasions (see p. 34, *supra*). The employees' position is that since the carriers can enforce awards in their own favor without the necessity of going to court, the employees should not be compelled to go to the trouble of suing and engaging in expensive and time-consuming litigation to obtain enforcement of awards when they have been successful before the Board. (*Ibid.*) While it is difficult on this point to judge cases in the abstract, it can be said that the object and hope of the Railway Labor Act was to insure the peaceful settlement of labor disputes, and the reason for giving the employees the remedy contained in paragraph (p)

was to provide a means for enforcement of awards which would make the use of economic pressure unnecessary.

But the fact that such tactics may have been adopted does not, in our view, change the situation so as to give the carrier an additional judicial remedy. Before the Railway Labor Act and the Declaratory Judgment Act were passed, the employees could have enforced their claims under labor agreements either through a lawsuit or by the threat to use economic force. The carriers' only judicial remedy at that time was defensive, a fact which obviously did not deprive them of constitutional rights.

The question then comes down to what Congress intended. The legislative history indicates that Congress did not have in mind the possibility that the enforcement suit under paragraph (p) would not be used by the employees. Since the employment of a threat to strike as a device to enforce Adjustment Board awards was hoped to be avoided, it did not affect the understanding of Congress that the statutory remedies were expected to be adequate to cover all situations and accordingly were exclusive.

We believe it probably true, however, that in establishing an adequate remedy to cover all situations Congress assumed that the remedy would be used. We can do little more than speculate as to whether Congress would have intended the remedy to be exclusive if it had known that the

labor organizations would refuse to avail themselves of it. That would depend in part on whether the object of Congress was to provide an adequate means of judicial review of the Board's orders or an effective and legal method of enforcing them when disobeyed. The legislative history (*infra*, pp. 75–80) shows concern only as to the latter. Accordingly, despite the effect of the employees' unforeseen refusal to avail themselves of the remedy upon its practical adequacy, we do not feel free to urge that, because of the manner in which the Act has operated, it should be construed in a way not intended by the Congress.

Petitioner attacks the adequacy of the statutory remedy on the ground that the Adjustment Board is not a judicial or quasi-judicial body and that its procedure does not conform to the standards generally recognized as essential to due process. It may be conceded that the Board differs in many respects from other administrative agencies or tribunals. See p. 23, *supra*. But as long as the constitutional rights of the carriers are safeguarded, this would appear to be immaterial. The carrier has a legal right to disregard a Board order until it has been affirmed by a court in an action brought under paragraph (p). The carrier will be able to present its side of the case adequately in a defense to such a proceeding. Since an award has no legal effect until judicially approved, the carriers' constitu-

tional rights are protected irrespective of the nature of the Board or its procedure."[71]

For the Act, in making the Board's awards *prima facie* evidence of the facts stated, merely shifts the burden of proof. *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412; *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478, 482. Congress has the power to shift the burden, and certainly may do so on the basis of a preliminary determination of facts, regardless of whether such determination was based upon a completely judicial proceeding. *Nickey* v. *Mississippi*, 292 U. S. 393 (tax assessment *prima facie* valid); *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U. S. 440, 451–454 (engineer's report *prima facie* evidence).

From the above analysis we believe that the remedy established by Congress was, and was intended to be, legally adequate to protect both carriers and employees in all situations, once a case had been decided by the Adjustment Board. The fact that such a remedy was established affords support for the belief that Congress intended that

[71] There is no indication in the statute that Congress intended that the Adjustment Board not follow the procedural standards commonly accepted by other judicial agencies (see paragraphs (i), (j), and (m) of Section 3), although the Board does lack the subpoena power granted to most administrative agencies. The Board has generally proceeded, however, on the assumption that its procedure was intended to be the same as that of the adjustment boards established by agreement before 1934. See pp. 23, *et seq.*

remedy to be followed once the statutory machinery was invoked.

b. *The analogy of the Interstate Commerce Act.* This construction of the Act is supported by the practice under Section 16 (2) of the Interstate Commerce Act, which Section 3, First (p) follows almost in *haec verba.* See p. 91, n. 99, *infra.* Both statutes relate to actions against carriers, in the one instance by shippers and in the other by employees. Neither gives the carrier any remedy except by way of defense.

Under Section 16 (2) in many cases shippers have an election whether to proceed before the courts or before the Interstate Commerce Commission. *Baltimore & Ohio R. Co.* v. *Brady,* 288 U. S. 448, see p. 57, *supra.* But after a shipper has taken his case to the Commission, Section 16 (2) has been held to provide the exclusive remedy. *Ibid.* If he loses before the Commission, he is remediless. *Ibid.; Brady* v. *Interstate Commerce Commission,* 43 F. (2) 847 (N. D. W. Va.), affirmed, *sub nom. Brady* v. *United States,* 283 U. S. 804; *Interstate Commerce Commission* v. *United States,* 289 U. S. 385, 394; *Standard Oil Co.* v. *United States,* 283 U. S. 235, as interpreted in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 140n. And the remedy prescribed in that section has been held to bar the carrier from suing to enjoin the enforcement of a reparations order. *Pittsburgh & W. V. Ry. Co.* v. *United States,* 6 F. (2d) 646 (W. D. Pa.); *Balti-*

more & Ohio R. Co. v. *United States,* 87 F. (2d) 605, 606 (C. C. A. 3). Although the latter cases involved suits for injunctions,[72] we think that the same policy applies to actions for declaratory judgments when a special statutory remedy is available.

More significant, perhaps, than these decisions was the general practice and understanding that carriers could not sue to set aside reparations orders. Whether because no such action was available to them or because they were satisfied with the protection afforded them as defendants in proceedings brought under Section 16 (2), they have not instituted many such actions. Whatever the reason, Congress, which modeled paragraph (p) of the Railway Labor Act on Section 16 (2), may not unreasonably be deemed to have intended it to have the same effect as an exclusive remedy once proceedings had been instituted before the administrative body.

c. *The advantages given the employees.* To permit a carrier to bring suit for a declaration as to the meaning of a railway labor contract, after the Adjustment Board has decided the identical case against the carrier, would deprive the employees of some of the advantages which paragraph (p) was designed to give them. Under that paragraph once an employee had convinced the Adjustment Board that his claim should be allowed, he was

[72] The decisions turned in part on considerations applicable only to cases under the Urgent Deficiencies Act.

given the choice of venue, immunity from costs, and the right to attorneys' fees, and in addition the award became *prima facie* evidence of the facts stated. In the absence of express statutory authorization, the first three [13] of these would clearly not be available in a suit brought by the carrier.[14]

It is no answer to impute triviality to these advantages by characterizing them as merely procedural. Congress intended the successful claimant before the Adjustment Board to have them, and they will be unavailable to him if he must defend his award in a suit brought by the carrier. On this point we can add nothing to the ably reasoned opinion of Justice Rutledge in the court below (R. 334–339).

Petitioner argues that the employees may still secure these advantages if they sue within the two-

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[13] A court of equity may allow costs "as between solicitor and client," but only "in exceptional cases." *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 167.

[14] This would probably not be so as to the requirement that the Board's award be *prima facie* evidence. If we assume that Congress did not intend paragraph (p) to provide an exclusive method of review, it would not have intended that a Board award be given less weight in a suit by the carrier than in a suit by an employee. Accordingly any court which was called upon to review the Board's decision, or to pass upon the same dispute after the Board had made its award, would be required to give the award at least the weight prescribed in a proceeding under paragraph (p). This conclusion can rest both upon what Congress would have intended under this particular statute and upon general principles of administrative law. Cf. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177.

year period allowed, and that even if the carrier has previously instituted its own independent suit, the employees would not be foreclosed from bringing a statutory enforcement suit; that if they did so the court in which the first suit was brought would be required to stay its hand until the second case had been terminated. But the result would be that the employees would still, to some extent, have to defend a separate suit brought by the carrier, in which the statutory advantages would not be available to them. Furthermore, it is highly speculative, in view of the vagaries of court calendars and the range of discretion open to federal and state trial court judges, whether once the carrier had brought its suit, the situation would invariably be adjusted so as to protect the employee in the manner suggested."[73]

THE SECOND QUESTION

WHETHER THE BOARD MAY MAKE AN AWARD EX PARTE IF ONE PARTY TO THE DISPUTE DOES NOT APPEAR BEFORE THE BOARD, AND IF SO THE EFFECT GIVEN BY THE STATUTE TO SUCH AN AWARD

The Court has asked our view as to whether the Board may make an award *ex parte* if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award.

Inasmuch as the Act requires the Board to give notice to the parties involved in a dispute (Sec. 3,

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[73] See pp. 28–29, *supra*.

First (j)), there can be no *ex parte* award in the sense that the adverse party is not notified and given an opportunity to be present. Accordingly, we assume that the Court's question relates to a case in which the responding party is notified but does not appear.

We think that if a party does not appear after notice is received, the Board may make an award against him,[16] and that such an award shall have the same effect as if he had appeared.[17] The Act provides that disputes may be referred to the Board "by either party" (paragraph (i)). The Board is to give notice to all parties, and is empowered after hearing to enter its award. There is no restriction upon the effect of these general provisions in case one party does not appear, and we think that no such limitation can possibly be implied.

The statutory provisions do not differ substantially from those relating to other judicial or quasi-judicial agencies, and we think it proper to assume that the Board would have the power, unquestionably possessed by other bodies, to render a decision although one party fails to appear. To hold that the Board's proceedings could be hamstrung or rendered less effective by the failure

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[16] Whether such an award could be entered by default, without any consideration of the merits of the case presented by the petitioning party, would presumably depend upon the rules of the Board.

[17] Since this is so, we do not think the responding party's appearance may properly be regarded as voluntary.

of a party to participate in its proceedings would enable the defending party to nullify the statutory scheme.

THE THIRD QUESTION

THE EFFECT OF THE EXPIRATION OF THE TWO-YEAR PERIOD SPECIFIED BY SECTION 3, FIRST (Q) UPON THE RIGHT OF EITHER PARTY TO THE DISPUTE TO OBTAIN A DETERMINATION OF IT IN THE COURTS

If either party may obtain an independent determination of a dispute in the courts immediately after and not withstanding the Board has entered its award, apart from the procedure prescribed in the Act, he or it can unquestionably still do so after the expiration of the two-year period specified in paragraph (q) for suing on Board awards.[78] The only question which need be considered here is whether the same result follows if it should be held that, if the dispute has gone to the Board, a party may not sue (except in the manner specified in paragraph (p)) during the two-year period.[79] The court below left that question open, treating the case as one begun before the expiration of the two years. The two years ex-

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[78] The paragraph reads as follows: "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

[79] We assume in the following discussion that no other statute of limitations stands as a bar to the suit in a particular case. Such statutes would presumably govern if the limitation in paragraph (q) did not apply.

pired, however, while the case was under consideration by the Court of Appeals.[50]

An employee who has prevailed before the Board can no longer bring the action described in paragraph (p) after two years have elapsed from the time the Board's award became effective (R. 347). We think that Congress would not have intended him to be able to sue on the contract, independently of the award, after that period. This result can be supported on the ground that his original cause of action on the contract was merged in the award. Whatever the theory, we think that a holding that all actions by employees are barred after the two years is most consistent with the policy of limitation contained in paragraph (q).

If, as we are assuming *arguendo,* the carrier has no right to institute a suit during the two-year period, it does not seem reasonable to hold that its cause of action, which vanished when the case was first submitted to the Adjustment Board, revived at the expiration of the two years, the exact moment when the employee's claim became unenforceable in court. It is more reasonable to conclude that the Board's award, and the claim upon which it was based, become dead if not obeyed within two years and if no enforcement suit has been brought within that time. The carrier would then

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[50] The Adjustment Board's award was made October 24, 1938 (R. 4). The case was argued before the Court of Appeals on April 18, 1940 (R. 330). The case was decided by the Court of Appeals on November 18, 1941 (R. 331).

be under no legal obligation to comply with the award, and there would be no substantial basis for allowing it to maintain an action involving the question raised. Indeed, after the employee had lost his right to enforce his claim, there might no longer be even a case or controversy in the constitutional sense; there would merely be a difference of opinion between the parties as to how the contract should be interpreted.[81]

For these reasons we are of the opinion that if the submission of a case to the Adjustment Board should be held to deprive a carrier of the right to bring a separate judicial proceeding, the disability should not be limited to the two-year period, but should be regarded as permanent.

THE FOURTH QUESTION

THE EFFECT OF THE WORDS "FINAL AND BINDING" IN SECTION 3, FIRST (M) UPON THE RIGHT TO RESORT TO THE COURTS AND UPON THE SCOPE OF JUDICIAL REVIEW, (A) DURING THE TWO-YEAR PERIOD, AND (B) AFTER EXPIRATION OF THE TWO-YEAR PERIOD[82]

Section 3, First (m) of the Railway Labor Act states that the awards of the Adjustment Board

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[81] To the extent that new claims could arise based upon a continuation of the same conduct, the question would not be academic. New proceedings could presumably be based upon acts occurring after, or differing from, those which were the basis of the claim before the Adjustment Board.

[82] For reasons set forth in answer to the third question (*supra*, pp. 67–69), we think the right to resort to the courts outside of paragraph (p) and the scope of judicial review do not change at the expiration of the two-year

shall be "final and binding upon both parties to the dispute, except in so far as they shall contain a money award." Paragraph (p), which is not limited to money awards,[82] specifies the only statutory means of enforcing such awards, and declares that in such cases the order of the Board shall be "prima facie evidence" of the facts stated. These two paragraphs contain apparently inconsistent provisions as to the manner in which the Board's awards shall be treated. The language of paragraph (p) makes it clear that the *prima facie* evidence rule governs suits brought to enforce awards. The question is what effect, if any, can be given to the clause in paragraph (m). To the extent that the clause makes an award conclusive, it strengthens the position taken in answer to the court's First Question that no extra-statutory method of reviewing the Board's orders is available.

A. LEGISLATIVE HISTORY

Since the language of the Act is itself responsible for doubt as to what was meant, we turn to other indicia of legislative intention. Neither the committee reports nor the congressional debates, however, deal with this issue. Some idea as to what

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period. Accordingly, the views set forth in this section are equally applicable to the period before and after the expiration of two years from the Board's award.

[82] In this respect paragraph (p) differs from Section 16 (2) of the Interstate Commerce Act, which applies only to orders "for the payment of money." See p. 91, *infra*.

Congress intended may be gleaned from an examination of the historical background of paragraph (m), and also from the references to it in the legislative hearings on the 1934 Act.

1. *Historical background.*—The words "final and binding" in paragraph (m) were taken from Section 3 of the 1926 Railway Labor Act.[54] That section (44 Stat. 577, 579) provided that boards of adjustment should be created by agreement of the parties, and that the agreement should, *inter alia,* contain a stipulation that "decisions of adjustment boards shall be *final and binding* on both parties to the dispute; and it shall be the duty of both to abide by such decisions * * *". (Section 3 (e)). (Italics supplied). The quoted passage would seem in turn to have been taken from the agreements between the carriers and train service employees for the Southeastern, Eastern and Western Regions, adopted in 1921, establishing regional adjustment boards.[55] The thirteenth paragraph of each of these agreements provided that:

> 13. All decisions of the Board shall be approved by a majority vote of the full membership of the Board, and shall be *final and binding* upon the parties to the dispute. [Italics supplied.]

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[54] Mr. Eastman so testified before the House Committee. House Hearings, p. 58.

[55] These agreements are quoted in the Appendix to the Compilation, pages 39, 43, and 50.

Similar language has been included in the arbitration provisions of railway labor legislation for a number of years. Section 8 (*l*) of the 1926 Act (44 Stat. 577, 585, 45 U. S. C. § 158(1)), which remained unchanged in 1934, declared that agreements to arbitrate

> Shall provide that the award, when so filed [in a United States District Court], shall be *final and conclusive* upon the parties as to the facts determined by said award and as to the merits of the controversy decided; [Italics supplied.]

Title 3 of the Transportation Act of 1920 (c. 91, 41 Stat. 469) contained no arbitration section. Its predecessor, the Newlands Act of July 15, 1913 (38 Stat. 103, 105) provided, however, for the settlement of controversies by agreements to arbitrate. Section 4 of that Act stated that "the agreement to arbitrate—

* * * * *

> Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arises or the arbitration is entered into, and *shall be final and conclusive* upon the parties to the agreement unless set aside for error of law apparent on the record; [Italics supplied.]

A substantially identical paragraph was contained in Section 3, Second, of the Erdman Act of June 1, 1898 (30 Stat. 424, 425).[56]

All of these provisions, the language of which is similar to that contained in paragraph (m) of the present Act, differ from it in one fundamental respect. In every case the tribunal which was to render "final and binding," or "final and conclusive," awards was to be established by the agreement of the parties. The statutes merely declared that such agreements, if made, should contain such clauses. But the finality of the awards was ultimately dependent upon the consent of the parties, not upon a statutory mandate. Questions as to the effect of the awards would thus be determined in accordance with the principles of the law of contracts or of voluntary arbitration.

It is, of course, to be noted that the "final and binding" clause does not apply to money awards, which constitute much the largest proportion of the decisions rendered by the Adjustment Board.[57]

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[56] These provisions were applied in *Georgia & F. Ry. Co.* v. *Brotherhood of Locomotive Engineers*, 217 Fed. 755 (C. C. A. 5), and *In re Southern Pacific Co.*, 155 Fed. 1001 (C. C. N. D. Cal.). In these cases the court's power to overturn awards was regarded as the same as in common law arbitration.

[57] The Secretary of the First Division has advised the Solicitor General that the 789 sustained awards rendered by that Division during the year 1942 fell in the following classes: (1) money awards 517; (2) mixed awards 221; (3) non-money awards 51.

Money awards were presumably treated differently because of a belief that the Constitution required a trial by jury to be available in such cases.

2. *The legislative hearings.* The legislative hearings show that the draftsmen of the 1934 Act unquestionably obtained the "final and binding" clause in paragraph (m) from the provisions in the earlier statutes for the inclusion of such a requirement in adjustment and arbitration agreements. Mr. Eastman stated, in reference to paragraph (m) (House Hearings, p. 58):

> That is the same language which, as I recall it, is in the present act with reference to decisions of boards of adjustment on grievances. The present act also provides that if the parties agree to arbitration of a major issue, then the decision of the board of arbitration shall be final and conclusive.
>
> Now, the only difference here is that there is provision for preventing deadlocks on an adjustment board by the appointment of a neutral member.

In answer to questions as to the right of employees to strike if an award went against them, Mr. Eastman declared (*id.*, p. 59):[88]

> In my answer to you I said there was nothing in the act which provided for the

[88] The question as to the right to enjoin a strike by employees was seemingly left up in the air. Mr. Eastman's legal adviser, Mr. Carmalt, thought it arguable that such a

enforcement of those particular decisions. That answer would not apply to decisions of the adjustment board, and they are made final and binding by the terms of this act, and as I understand it, the labor organizations, none of them, are objecting to that provision. They have their day in court and they have their members on the adjustment board, and if an agreement cannot be reached between the parties representing both sides on the adjustment board, a neutral man steps in and renders the decision, and they will be required to accept that decision when made, with respect to these minor matters. * * *

The colloquy on this subject continued (House Hearings, pp. 60–61):

Mr. COOPER. Do I understand this paragraph then on page 17, in which it says, "the awards shall be final and binding upon both parties to disputes", would that pre-

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strike might be enjoined under the law (House Hearings, pp. 62–63). Mr. Eastman thought the contingency would not arise, since he could not "conceive of organizations striking over the settlement of grievances, particularly when they had been passed upon by an impartial tribunal under Government auspices." His idea was to find out from experience whether such a provision was necessary before including it in the law (pp. 62–64). Congressman Wolverton stated, however, that although that might be true, he was seeking to find out "whether this language declares something else to be the policy" (p. 64). Mr. Eastman then agreed to study the matter and give the Committee his opinion on it, but so far as we know, nothing further was done.

vent a railroad employee or an organization from striking, if they saw fit? Would it be a violation of the law if they did that?

Mr. PETTENGILL. Could an injunction issue to prevent them from doing it?

Commissioner EASTMAN. I cannot tell you what the legal procedures would be in enforcing the award, where it is against the employee. Paragraph (p) covers the case where a carrier does not comply with the order of the adjustment board.

Mr. COOPER. Would it apply to either carrier and/or employees? Now, if we go that far are we not writing something new into the law of the land to deprive the employees of rights which they already had?

Commissioner EASTMAN. Well, as I say, you have exactly similar provisions in the present labor act with respect to decisions by adjustment boards and where they agree to arbitration, and this law is in effect an agreement on the part of the parties to arbitrate all of these minor disputes.

The CHAIRMAN. Was that not one of the reasons, to try to keep down strikes to get people together?

Commissioner EASTMAN. Yes. It is a very important part of it. The willingness of the employees to agree to a provision of that sort seemed to me to be a very important and praiseworthy thing.

Mr. COOPER. Well, I fully approve of that method, Mr. Commissioner, and I say that if they are going into these boards and are

willing to go in there, why probably they ought to abide by the finding of the board; but I do not know whether I would want to go so far as to say that if they do not agree to it that it would be a violation of law.

Mr. WOLVERTON. Does this act in any way, Mr. Eastman, provide that it will be a violation of law if they do not comply with the decree and the order that is made?

Commissioner EASTMAN. It says that the award shall be final and binding.

Mr. WOLVERTON. Does this bill attempt in any way to enforce that provision; and if so, is it contrary to public policy to put such a provision in the bill?

Commissioner EASTMAN. Page 19, line 19 [the last sentence of paragraph (p)], it says:

The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the adjustment board.

Chairman Winslow of the former Board of Mediation, subsequently stated with reference to the "final and binding" clause (House Hearings, p. 72):

* * * The bill requires "final and binding" may apply to all decisions of an adjustment board, and that seems easy, but it is not. In the early days of our work, with

> all good intent, we thought that if disputes went through an adjustment board and were decided, that was the end of it for us, and for everybody else, by law. * * *

His experience proved, however, that though the parties agreed that the decisions were "final and binding," they disagreed as to how they should be applied, and that in such cases mediation became necessary. Thus, "in spite of the provision 'final and binding' there is considerable trouble arising" (p. 73).

George M. Harrison, testifying on behalf of the Railway Labor Executives Association, stated his views on the subject as follows (House Hearings, p. 82):

> When that decision is made, the law will provide that it shall be final and binding on the parties and enforceable in the courts, in substantially the same manner as the present law provides for the enforcement of arbitration awards, the extent that the court may go in issuing a mandatory process to compel observance of the decision on the grievance basis.

He then described the situation under the provisions of the 1926 Act as follows (House Hearings, pp. 88–89):

> * * * Now, under the present law we have agreements, set up local machinery, which may be considered comparable to what this will provide, to be established if they want to establish it; but in the

> agreements establishing the voluntary machinery, there shall be a provision to make final and binding and conclusive on the parties the decisions made by such machinery and the parties shall in good faith abide by such decisions. I know—my opinion is, regardless of a specific provision in the law, that if you had a contract made by true and legal representatives set up by such voluntary machinery, you could go into court and enforce the terms of that contract. I am not an attorney, but I base that on experience that we have had, because some of these local boards have made decisions and managements have refused to respect them, and when court action was threatened, we generally got the terms of the contract obeyed.

Before the Senate Committee, Mr. Harrison had stated (Senate Hearings, p. 32):

> Then we provided, in order to overcome our past experience, that the decision when made by the adjustment board shall be enforceable. We have had several instances where, even though the law provides that the agreement setting up the board shall provide for the acceptance of the decision by the parties, that the decisions haven't been obeyed.
>
> [p. 34.] The CHAIRMAN. Are the decisions enforceable in the courts just the same as the national-board decisions?
>
> Mr. HARRISON. We don't provide for that, but it is our intention and our pur-

> pose that such system boards, group boards, or regional boards that are established by the parties, by agreement, will provide such terms that the decisions can be enforced in the courts. The fact of the matter is the present law provides for that. It provides that decisions shall be final and binding and conclusive on the parties, and I think that kind of decisions can be enforced.

He emphasized the fact that under an agreement to settle disputes, the award would voluntarily be lived up to by the labor organizations (House Hearings, p. 89).

These statements of opinion before the congressional committees show that the witnesses expected the awards of the Adjustment Board to have the same effect as those of the earlier adjustment and arbitration boards, and that such awards have usually been obeyed voluntarily. They also indicate that a method of enforcement against the carrier was considered desirable in case of failure to comply, but was not thought necessary against the employees since the carrier could itself put the award into effect. See pp. 55–56, *supra*.

Paragraph (p), which contains the enforcement device adopted, was regarded as strengthening the award rather than the contrary. No one referred to the *prima facie* evidence provision in that paragraph, or conceived of the possibility of conflict between that provision and the "final and binding" clause in paragraph (m). Nor did anyone advert

to the fact that most of the Board's decisions would be money awards to which the Act did not give final and binding effect.

B. THE MEANING TO BE GIVEN THE "FINAL AND BINDING" CLAUSE

It is apparent from the above that neither Congress nor the persons who explained the Act to its committees were conscious of the possible inconsistency between the "final and binding" clause in paragraph (m), derived from earlier adjustment and arbitration statutes, and the *prima facie* evidence rule in paragraph (p) taken from the Interstate Commerce Act. In the absence of any actual legislative intention as to how the provisions were to be reconciled, we must, in accordance with familiar rules of statutory construction, search for an interpretation of the law which will give each paragraph meaning and leave Section 3, as a whole, harmonious and consistent.

Conceivably the "final and binding" clause might be interpreted as (1) foreclosing all review of non-money awards, except as provided in paragraph (p) or required by the Constitution; (2) giving such awards the same effect as an arbitration award, to the extent legally permissible; (3) expressing a desire that the parties abide by the awards, but with paragraph (p) controlling as to the scope of review and the procedure to be followed; or (4) making non-money awards subject only to the final and binding clause and money

awards alone subject to the *prima facie* evidence rule contained in paragraph (p).

1. The "final and binding" clause in paragraph (m) might be deemed to require that an award (except for a money award) be treated as conclusive, except as otherwise specifically indicated in the Act or as limited by constitutional considerations. This view would appear to be most consistent with the strong language used. The clause would not be conclusive, of course, in an enforcement suit brought by an employee under paragraph (p), since in that case the Act specifically requires that it be treated only as *prima facie* evidence.

But the "final and binding" clause might be held to bar all other methods of attacking non-money awards, to the extent legally permissible. This would mean that neither the employees nor the carriers could seek review of awards in cases decided against them or otherwise collaterally impeach an award. This result would be constitutional as to the carrier if the Court regards the right of the carrier to defend its position in an enforcement action under paragraph (p) as a legally adequate remedy (see pp. 57–62, *supra*). It would be valid as to the employee if the decision in the *Moore* case is not restricted or overruled, and if he has an election between suing in court or proceeding before the Board. He cannot complain of the inadequacy of a remedy he has voluntarily chosen. And even if he has no such choice it

would probably be valid as to an employee who has invoked the Board's services. The position of such an employee is analogous to that of a shipper who can place his claim for reparations only before the Interstate Commerce Commission. If such a shipper takes his case to the Commission and is denied relief, he has no available avenue of judicial review.[89] This result has been based in part on the discredited "negative order" doctrine, and in part on the "statutory scheme dealing with reparations."[90] Whatever the theory, it has never been thought to deprive the shipper of constitutional rights.[91]

If a proceeding were brought *against* an employee,[92] these principles might not apply. Such an employee would not have invoked the Board's services. Nor would he be able to avoid compli-

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[89] See pp. 62–63, *supra*.

[90] *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 140n.

[91] If the right of shippers to judicial review had rested on the Constitution, the negative order cases would have been in violation of the Constitution. This was not suggested in the *Rochester Telephone* case.

[92] Although it is rarely, if ever, done, the carriers have equal power with the employees to bring cases before the Board. Sec. 3, First (i). An employee might also be before the Board as a third party respondent in cases brought by other employees against a carrier. E. g., *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7), certiorari denied, 300 U. S. 673. Seniority disputes often find employees, or groups of employees, on the side of the carrier. *Ibid; Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (C. C. A. 5); *Stephenson* v. *New Orleans & N. E. R. Co.*, 180 Miss. 147, 177 So. 509 (1937).

ance with the Board's order until an enforcement suit was instituted against him and thus assert his position defensively; the carrier might make the award effective immediately.

Wherever the remedy was legally inadequate, a person would presumably be entitled to bring an appropriate independent action attacking the award of the Board. Cf. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. In such an action, the Board's award would be "final and binding" to the extent that Congress could make it so. In other words, the scope of judicial review would be the minimum required by the Constitution. Although it is unnecessary to determine in this case just what those limits are, we assume that the court would at least have power to determine questions of law, such as whether there had been compliance with the statute and the Constitution.[93]

2. Since the "final and binding" clause was derived from earlier statutes requiring the inclusion within adjustment and arbitration agreements of a similar provision, it can be argued that it was intended to give non-money awards of the adjustment boards the same effect as those of its predecessors. The testimony of Mr. Eastman and Mr. Harrison quoted *supra,* pp. 74–80 supports this conclusion.

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[93] As to whether the question of the existence of substantial evidence to support a finding raises a question of law see *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, Nos. 387–388, decided February 8, 1943.

There has been no judicial pronouncement as to the effect of the awards of the early adjustment boards; but the agreements establishing the boards closely resemble contracts to arbitrate and we assume that the principles governing the enforcement of arbitration awards would be applicable. Such awards normally would be enforced by the courts in the absence of "irregularity, fraud, *ultra vires* or other defect," *Marine Transit Co.* v. *Dreyfus,* 284 U. S. 263, 276; *Burchell* v. *Marsh,* 17 How. 344, 349;[*] *York & Cumberland R. R. Co.* v. *Myers,* 18 How. 246, 253. The Railway Labor Act specifies, in Section 9, that an arbitration award may be impeached only if it does not conform to the requirements of the Act, is not confined to the stipulations of the agreement to arbitrate, or is fraudulent or corrupt. The United States Arbitration Act of February 12, 1925 (43 Stat. 883, 885, 9 U. S. C. Sec. 10), the Uniform Arbitration Act (9 Uniform Laws Annotated, p. 61) and the Draft State Arbitration Act (e. g., N. Y. Civ. Practice Act, Sec. 1457) all provide that an award may be vacated if fraudulent or corrupt, if the arbitrators have been guilty of misconduct (such as refusing to hear material evidence) or prejudicial misbe-

[*] In the *Burchell* case the Court stated "If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."

havior, or if the arbitrators have "exceeded their powers."[95]

These reasons for setting aside an arbitration award are not strictly applicable to administrative determinations. They demonstrate, however, an intention that the power of the courts to overturn awards be circumscribed within extremely narrow limits. When translated into terms of administrative law, they would probably permit the courts only to overturn an award if it was not issued in conformity to the statute or was otherwise illegal (see pp. 84–85, *supra*).[96] These have been the grounds upon which awards of the present Adjustment Board have been invalidated. (See pp. 34–35, *supra*.)

In the law of private arbitration, since the entire proceeding was based upon contract, the usual contractual remedies were available unless the agreement specified otherwise.[97] This would customarily mean that the person who broke the contract could be sued for damages or to prevent further breach. Until the declaratory judgment came into existence, he would have been able to bring no action of his own.

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[95] The citations to the various state arbitration laws are collected in Sturges, *Commercial Arbitrations and Awards* (1930), p. ix and appendix.

[96] We assume that an administrative order, like that of an arbitration board, could also be set aside for fraud, but know of no cases in which that problem has arisen.

[97] It is unnecessary here to consider the extent to which the courts at common law refused to enforce contracts to arbitrate.

The tendency of modern arbitration statutes, such as the United States Arbitration Act and the Railway Labor Act itself, is to permit an award to be attacked only in a prescribed manner. Under the Railway Labor Act, an arbitration award may be challenged on the specified grounds only within ten days after it has been filed with the clerk of a federal district court (Section 9).[20]

We think this expression of legislative policy as to arbitrations generally may well be given effect in construing the provision of paragraph (m), which has its source in statutory provisions for arbitration. If the arbitration analogy is applied, a non-money award could be contested only in the manner prescribed in the Act. This would lead to the conclusion that the means of setting aside awards prescribed in paragraph (p), if legally adequate, would be exclusive.

The consequence of giving to the final and binding clause the effect given to its predecessors would thus mean that both the method and the scope of review would be narrowly restricted. Such an interpretation would lead, in its practical operation, to the same result as that previously suggested, that the award be deemed final except where the statute specifies to the contrary or where necessary to fulfill constitutional requirements.

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[20] Cf. United States Arbitration Act, Section 10; Uniform Arbitration Act, Secs. 15–18 (9 U. L. A. 66–67); N. Y. Civ. Practice Act, §§ 1456–1458; Sturges, loc. cit. *supra*, c. 15.

3. The effect of the "final and binding" clause in paragraph (m) may be regarded as having been generally curtailed by the *prima facie* evidence provision in paragraph (p). It can be argued that the latter paragraph, which gives the Board's order relatively little weight, shows that paragraph (m) was not intended to determine the scope of judicial review or affect the right to resort to the courts. This view finds support in the apparent unreasonableness of treating the award as conclusive when it has *prima facie* effect in the only kind of proceeding in which it can be enforced, as well as the fact that the clause is in terms inapplicable to the larger proportion of money awards entered by the Board. This anomaly can be avoided by applying the specific indication in paragraph (p) as to the desired scope of review to any judicial proceeding involving Board orders.

On this theory, the "final and binding" clause has the effect merely of a legislative declaration that the parties ought, and were expected, to abide by Board orders. The force of the mandatory character of the language used is destroyed by the fact that the only means of enforcement against a carrier is through a suit in which the award is given only *prima facie* weight.

That the "final and binding" clause was largely precatory in and of itself appears from the fact that Mr. Eastman and Mr. Harrison regarded it as strengthened by paragraph (p). Mr. Harrison indicated that similar language in the earlier ad-

justment agreements was valuable in the main as an expression of the good faith of the parties establishing the Board and as manifesting their willingness to abide by an award voluntarily. If a carrier refused to comply, the threat of court action was necessary. Paragraph (p) was designed to provide a similar sanction for the awards of the new Board.

If the "final and binding" clause is given this effect, it would not control the scope of judicial review, nor would it limit the ways in which orders of the Board could be judicially attacked. Paragraph (p) would govern on both of these issues. The scope of review generally, as to both money and non-money awards, would be that specified in the later paragraph; the award would be given *prima facie* effect only. If the Court should, for reasons unconnected with the "final and binding" clause, hold paragraph (p) to be an exclusive remedy, all other avenues of review would be closed. If the Court should hold to the contrary, Board orders would be subject to review in other proceedings, in all of which they would be given *prima facie* weight.

4. Since the "final and binding" clause does not apply to money awards, it may be suggested that it can be reconciled with paragraph (p) by giving non-money awards final and binding effect (to the extent constitutionally permissible) but leaving money awards alone to be controlled by the procedure prescribed in the latter paragraph. We do not think that the Act can be so construed.

It is true that the exemption of money awards from the "final and binding" clause, and the *prima facie* evidence rule in paragraph (p) both had their roots in the right to a jury trial in suits for money damages. Paragraph (p) was derived from Section 16 (2) of the Interstate Commerce Act, which only applied to orders for the payment of money, and which this Court has indicated was drafted in the light of the constitutional right to a jury trial. *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 458. But the fact that paragraph (p) was obviously modeled on Section 16 (2)" emphasizes the importance of the few

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" Section 16 (2) of the Interstate Commerce Act (before immaterial changes in 1940 (54 Stat. 912)) reads as follows:

If a carrier does not comply with an order *for the payment of money* within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of

Section 3, First (p), of the Railway Labor Act reads as follows:

If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates,

differences between the sections. Whereas Section 16 (2) is limited to an order "for the payment of

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general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims *damages*, and the order of the commission in the premises.

Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for *damages*, except that on the trial of such suit the findings and order of the commission

shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.

If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

a petition setting forth briefly the causes for which he claims *relief*, and the order of the division of the Adjustment Board in the premises.

Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board

shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States.

If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

money," and refers to actions for "damages" only, those phrases were omitted from paragraph (p) of the Railway Labor Act. And Congress added to the latter paragraph a sentence not contained in Section 16 (2), providing that:

> The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

Such other forms of relief as are contemplated in this provision for judgment of "mandamus or otherwise" are clearly broad enough to encompass non-money awards, and it would have been unnecessary to provide for them if only money awards were intended to be reached. This sentence was referred to in the hearings (see pp. 77–78 *supra*) as bolstering the final and binding clause. It was undoubtedly included in the Act in order to make it clear that both money and non-money awards could be enforced against the carriers.

Both paragraph (p) and the final and binding clause in paragraph (m) thus apply to non-money awards. We are accordingly compelled to conclude that no differentiation between the two paragraphs on the basis of a distinction between money and non-money awards would be warranted.

Recommendation.—We have suggested that the "final and binding" clause might, with some justification, be construed as:

1. Foreclosing all review of non-money awards, except as provided in paragraph (p) or required by the Constitution;

2. Giving an adjustment board award the same effect as an arbitration award, to the extent legally permissible; and

3. Expressing a desire that the parties abide by the award, but with paragraph (p) controlling as to the scope of review and the procedure to be followed.

The first of these interpretations is probably supported most closely by the ordinary meaning of the words employed; the second by the historical background of the clause, and partly by the statements of the persons testifying before the Congressional Committees; and the third by the practical effect of the broad scope of review allowed in the only proceeding in which the awards can be legally enforced, and the fact that the large proportion of money awards are not governed by the clause at all. The first two of the interpretations reach substantially the same results, as does the third if paragraph (p) be regarded as an exclusive remedy apart from paragraph (m). On any of these theories, if our views as to the adequacy of the remedy are correct, the Board's awards can normally be challenged only by way of defense to a suit brought under paragraph (p); in such a suit,

of course, the awards would have only *prima facie* weight.[100]

We believe that Congress intended the Board's awards to be accepted by the parties at least to the same extent as had been the decisions of its predecessors. No one thought that the statutory mandate would be less potent than a contractual provision to the same effect. Indeed, the enforcement procedure in paragraph (p) was regarded as strengthening the award. The failure of any one to refer to the *prima facie* evidence provision in that paragraph is an indication that no one was of the opinion that it would completely alter the effect of the awards. For this reason, we believe that the Board's awards should be made as "final" as possible, in accordance with either of the first two of the interpretations discussed above.

This view, we think, is also most consistent with the over-all purpose of the Act to insure the peaceful settlement of labor disputes. The friction arising from the many disputes as to grievances and the interpretation of contracts will be reduced to the extent that the parties treat the awards of the Board as "final and binding."

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[100] If paragraph (p) is held to be an exclusive remedy apart from the "final and binding" clause, money and non-money awards would be subject to the same treatment. If not, extra-statutory suits on money claims alone might be permissible. It is of some significance that, outside of the language of paragraph (m) itself, there is no indication in the legislative history or purposes of the Act that money and non-money awards were to be governed by different rules.

THE BASIC ISSUE UNDERLYING THIS CASE

The importance of this case transcends that of the rather technical legal issues to be decided. It involves fundamental differences between management and labor as to the effect to be given the adjustment provisions of the Railway Labor Act.

Labor favors the final and complete settlement of cases by the adjustment device and is willing, without other compulsion, to abide by awards of the Adjustment Board. When the Act was passed, the employees' representatives recognized that they were agreeing to abandon their right to strike over such questions. In return, labor expected the carriers voluntarily to comply with the Board's decisions.

Although the carriers might have been of the same view when the Act was passed, they have since taken the position that the Board's procedure deprives them of a fair hearing, that this affects the quality of the awards, and that many of the Board's decisions are plainly erroneous and seriously prejudicial to the efficient operation of the roads. As a result, they are frequently unwilling to comply with the awards unless forced to do so, or until they have had an opportunity to have the validity of the awards tested before a judicial tribunal.

The employees reply that the adjustment system will not be workable if the Board's awards are not treated as final without the necessity for litigation to enforce them. The employees' rep-

resentatives feel that, for financial and other reasons, they are in no position to compete with the carriers if such matters are taken to the courts, and that resort to litigation would delay final decisions for a long time after the entry of the Board's awards and thus cause even greater dissatisfaction than now prevails with the period between submissions and settlement. As a result, it was the policy of labor, before the beginning of the present war, not to sue on awards but to threaten to strike if awards were not obeyed. This policy generally resulted in compliance with the awards.

If the carriers prevail in this case, they will have found a means of bringing the Board's awards to the courts, and presumably will take to court all awards against them which they deem harmful. Irrespective of the merits of the decisions in such circumstances, it is clear that the result would be to open an avenue of review not contemplated by Congress and to lessen the effect of the Board's orders. If the employees prevail, on the other hand, they will continue to rely on their economic power instead of upon the judicial remedy provided in paragraph (p), and that paragraph will remain substantially a dead letter.

These difficulties arise because of the substitution of an adjustment system having its foundation in a mandatory statute for a procedure based upon agreements between the parties. When the parties

established the early adjustment boards by agreement, they generally felt bound as a matter of mutual good faith to accept the Board's decisions. The employees believe that the awards of the present Board should be treated with the same respect, particularly since they are final as to the employees if they lose. The carriers, however, see no reason why, since they have not given their word to accept the Board's decisions, the awards should be any more binding than those of other agencies whose decisions are given effect by law. The decisions of other agencies may not be finally accepted until upheld in the courts, and the carriers feel that they need not accept Adjustment Board awards which they deem clearly erroneous unless and until the employees make use of the statutory enforcement procedure which permits the orders to be judicially reviewed.

We have taken the position that paragraph (p) was designed to be an exclusive remedy once the Board has entered an award. We recognize, however, that, although this conclusion may be correct as a matter of statutory interpretation, it is not entirely realistic to bar all other means of review because of the adequacy of a remedy which those to whom it is given deliberately refuse to employ. Although one or the other result will follow, depending on how this case is decided, one cannot view with equanimity either a situation in which all awards of the Board, substantially insulated

against judicial review, are subject to enforcement by threats to strike, or one in which the carriers can use the declaratory judgment procedure to get at the Board's awards and thereby prevent the statute from operating in the manner originally intended.

Our view that the Act should be construed so as to make paragraph (p) an exclusive remedy is based largely on the theory that the carriers' right to defend an enforcement suit brought under that paragraph gave them adequate protection. This contemplates, of course, that paragraph (p) will be of more than academic effect, that carriers may refuse to comply with awards, and that the courts may determine the validity of the awards when suit is brought to enforce them. We think that Congress assumed that the carriers would comply with most of the awards without the need for litigation (as has been the case), but that when the carriers thought an award clearly unlawful they could properly await an enforcement suit against them. The failure of the Act to operate in the manner contemplated, however, would not seem to warrant a further, even though perhaps compensating, judicial departure from the statutory design.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
ROBERT L. STERN,
Attorney.

FEBRUARY 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 28. WASHINGTON TERMINAL CO. *v.* BOSWELL ET AL. Certiorari, 315 U. S. 795, to the United States Court

of Appeals for the District of Columbia. Argued October 19, 20, 1943. Reargued March 8, 9, 1943. Decided June 14, 1943. *Per Curiam:* Judgment affirmed by an equally divided Court. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case. *Mr. John Dickinson*, with whom *Messrs. Guy W. Knight* and *John B. Prizer* were on the briefs, for petitioner. *Mr. Willard H. McEwen*, with whom *Messrs. Frank L. Mulholland, Clarence M. Mulholland*, and *Harold C. Heiss* were on the briefs, for respondents. By special leave of Court, *Mr. Robert L. Stern*, with whom *Solicitor General Fahy* was on the brief, for the United States, as *amicus curiae*, on the reargument. Reported below: 124 F. 2d 235.